

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agriculture Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

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(No. 22, 531)

In re: KING MEAT COMPANY. FSQS Docket No. 4. Decided June 1983.

Consideration and order on remand.

King Meat Company's "newly discovered evidence", ordered to be considered by the District Court's remand order, is without weight, and does not warrant further exploration at a hearing. A letter written by the Department to Western States Meat Association does not support King Meat's contention that a beef arm chuck is a subprimal cut. Evidence that the trimming requirement is not enforced uniformly throughout the country is of no help to King Meat since the regulations were properly applied as to it. The fact that there are more graders to monitor compliance does not suggest that the sanction should be lessened since the grading service cannot watch a plant 24 hours a day and must be able to rely upon the integrity of the plant. The fact that King Meat no longer removes yield stamps without removing quality stamps is not significant since there are many ways to thwart the federal grading program.

Elizabeth Ann Peterson and Marshall Marcus, for complainant.
Richard J. Stall, Jr., Los Angeles California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

CONSIDERATION AND ORDER ON REMAND

This case comes to me by an order for remand filed March 2 1983, in the United States District Court for the Central District of California in *King Meat Packing Co. v. Block*, No. CV 81-6485 R (C.D. Cal.). The case was remanded "for the limited purpose of considering plaintiff's 'newly discovered evidence.'" The plaintiff is the District Court was the respondent in the administrative proceeding, but will be referred to herein as plaintiff.

The facts involved in this proceeding are set forth in the previous administrative decisions in this case (*In re King Meat Co.*, 38 Agric. Dec. 353 (1980) (remand order), 40 Agric. Dec. 1468 (final decision), 40 Agric. Dec. 1910 (1981) (order denying reconsideration, rehearing and reopening)), and will not be repeated here. The case relates to plaintiff's removal of yield grade designations, but not the quality designations, from 100 beef arm chucks that had not been substantially trimmed of external fat, which would have been lawful only if the arm chucks were "subprimal" cuts.

Plaintiff's newly discovered evidence relates to (i) a Department letter which plaintiff contends indicates that the Department considers arm chucks as subprimal cuts; (ii) information which plaintiff contends indicates that the trimming requirement is not applied

uniformly throughout the United States, particularly in the Denver Main Station area; and (iii) information that there are now more graders available to monitor compliance, and plaintiff no longer removes yield grade designations unless the quality grade designations are also removed.

For the reasons set forth below, I find no weight in plaintiff's "newly discovered evidence." After reading the entire District Court file, I have determined that further briefs or oral argument would not be helpful.

I. THE DEPARTMENT LETTER

On November 18, 1982, Paul M. Fuller, Deputy Director, Livestock, Meat, Grain, and Seed Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D.C., wrote a letter to Ms. Rosemary Mucklow, Executive Vice President and General Manager, Western States Meat Association, San Francisco, California, which states in its entirety (emphasis added):

Dear Rosemary:

This is in reference to the questions you posed to me over the phone last week regarding the definitions of primal, wholesale, subprimal, and retail cuts.

The Department has not developed detailed descriptions for what constitutes a primal or wholesale beef cut, but has chosen to list in its beef carcass grade standards and meat purchase specifications, as appropriate, the specific cuts which qualify for a given category (i.e., primal, wholesale, etc.). *In the specifications the following are referenced as primals: square-cut chucks, ribs, trimmed full loins, trimmed short loins, loin ends (sirloins), and rounds. Wholesale cuts of beef are referenced in the beef carcass grade standards (7 CFR 54.102) and are as follows: round, sirloin, short loin, rib, square-cut chuck, shank, brisket, plate, and flank. Combinations of some of these cuts are also regarded as "wholesale cuts" under the regulations; the cuts referenced by the Department are those most commonly considered as "wholesale cuts" by industry. References in the regulations and specifications, with the exception of the full loin and combination cuts, are to the smallest subdivision of a carcass that could still be referred to as a wholesale cut.*

We realize that some sources use the terms "primal" and "wholesale" interchangeably, listing all of our wholesale cuts as

primals. However, *in our standards and specifications we have always limited primal cuts to the major wholesale cuts (round, loin, rib, and chuck). For purposes of our regulations any further subdivision of a wholesale or primal cut is considered a subprimal or retail cut.*

I hope this information will be helpful to you.

Sincerely,

This letter, properly understood, provides no support whatever to plaintiff, but, rather shows that the Department does not regard an arm chuck as a subprimal cut. However, the third paragraph of the letter, if taken alone out of context, without reference to the second paragraph, lends itself to a specious argument supporting plaintiff. Plaintiff has utilized the third paragraph in that manner.

The opportunity for plaintiff's specious argument arises from the (unfortunate) use of the ambiguous term "chuck" in the third paragraph. The term "chuck" is used at times to refer to three different cuts of meat, *viz.*, (i) "cross-cut chuck" (the largest), (ii) "arm chuck" (middle size), and (iii) "square-cut chuck" (the smallest).¹ The largest cut (cross-cut chuck) consists of the square-cut chuck, the brisket, and the shank. If you remove the brisket from the cross-cut chuck, you have an arm chuck (middle size), the cut involved in this litigation. If you remove the shank from an arm chuck, you have a square-cut chuck, which is the smallest cut referred to as "chuck." (See Finding 3, 40 Agric. Dec. at 1471-72, slip op. at 6).

If the term "chuck" in the third paragraph of the letter had been used in the sense of the largest cut, *i.e.*, the cross-cut chuck (which consists of the square-cut chuck, the shank and the brisket), the third paragraph would have been stating that any further subdivision of the cross-cut chuck (*e.g.*, into an arm chuck or a square-cut chuck) is considered a subprimal cut.

However, *it is not possible* that the term "chuck" in the third paragraph was used in the sense of "cross-cut chuck." This can be demonstrated intrinsically (by reference to the second paragraph) and extrinsically (by reference to the standards, 7 C.F.R. §54.104(a)(1) and (g)).

Looking first at the letter itself, the third paragraph states (emphasis added):

¹ A diagram in which the (smallest) "square-cut chuck" is referred to as "chuck" is shown in the Appendix. The diagram appeared in the Food section of The Washington Post, June 5, 1983, p. H-1, in connection with an article entitled, "Women on the Cutting Edge."

However, in *our* standards and *specifications* we have *always* *limited primal cuts* to the major wholesale cuts (round, loin rib, and *chuck*).

The third paragraph of the letter does not purport to set forth a new, independent list of primal cuts, but, rather, purports to be listing the primal cuts as they have "always" been set forth, *inter alia*, in the Department's specifications. The second paragraph of the letter shows that the specifications refer to the following cuts as primals: "square-cut chucks, ribs, trimmed full loins, trimmed short loins, loin ends (sirloins), and rounds."

A comparison of the list of primals in the specifications (from the letter's second paragraph) with the list of primals in the letter's third paragraph shows that the rib and the round are the same in both lists, but that the third paragraph (i) shortens the "trimmed full loins, trimmed short loins, [and] loin ends (sirloins)" of the second paragraph to "loin," and (ii) shortens "square-cut chucks" to "chuck." Since the third paragraph merely purports to be listing the primals, *inter alia*, as they have always been set forth in the specifications, the term "chuck" in the third paragraph must be construed to refer to the cut listed as a primal cut in the specifications, *viz.*, the "square-cut chuck." Hence this intrinsic aid to construction shows beyond any doubt that the term "chuck" in the third paragraph of the letter refers to the "square-cut chuck," *i.e.*, the third paragraph is saying that a square-cut chuck (which is smaller than an arm chuck, the cut involved in this case) is a primal cut.

Moreover, as shown below, a comparison of the sentence quoted individually above from the third paragraph of the letter with a related sentence in paragraph two of the letter shows that if the word "chuck" in the third paragraph is construed to mean "cross-cut chuck," which is the only construction that would aid plaintiff, the third paragraph is irreconcilably in conflict with the related sentence in paragraph two. The first sentence quoted below is from the second paragraph of the letter, and the second sentence quoted below is from the third paragraph of the letter. Both sentences are taken verbatim from the letter, except for deletions and bracketed additions, and the word "cross-cut chuck" substituted for "chuck" in the sentence from the third paragraph. The sentences are as follows:

In the specifications the following are referenced as primals: square-cut chucks [the smallest of the cuts referred to as "chuck"]

... However, in our ... specifications we have always limited primal cuts to ... [cross-cut chucks, the largest of the cuts referred to as "chuck"]).

It is obvious that the second sentence quoted immediately above (from the letter's third paragraph) is squarely contrary to the first sentence quoted immediately above (from the letter's second paragraph). The latter sentence, as modified to conform to plaintiff's position, is not true. It states that the specifications have always limited primal cuts to "cross-cut chucks," the *largest* of the cuts referred to as "chuck," whereas in fact, the specifications include primal cuts "square-cut chucks," the *smallest* of the cuts referred to as "chuck." Accordingly, the term "chuck" in the third paragraph cannot possibly be construed to mean "cross-cut chuck" (the largest of the cuts referred to as "chuck"), which is the only construction that would aid plaintiff.

Since two intrinsic aids to construction set forth above show that the term "chuck" in the letter's third paragraph must be construed as "square-cut chuck," the smallest of the cuts referred to as "chuck," there is no need to look at extrinsic aids to construction. Nonetheless, since an extrinsic aid to construction also supports this view, it is set forth below.

The third paragraph of the letter refers to the Department standards, and states that the "primal cuts" are the same as the "major wholesale cuts." Specifically, the third paragraph states (emphasis added):

However, in our standards and specifications we have always limited primal cuts to the *major wholesale cuts* (round, loin, rib, and *chuck*).

The standards expressly refer to the "major wholesale cuts" as the "round, sirloin, short loin, rib, and square-cut chuck" (7 C.F.R. §54.104(a)(1) and (g)).² Here, again, a comparison of the list of "ma

² The standards provide (7 C.F.R. §54.104(a)(1) and (g)):

§54.104 *Application of standards for grades of carcass beef.*

(a) The grade of steer, heifer, cow, or bullock carcass consists of separate evaluations of two general considerations:

(1) The indicated yield of closely trimmed (1/2 inch fat or less), boneless retail cuts expected to be derived from the *major wholesale cuts* (round, sirloin, short loin, rib, and square-cut chuck) of a carcass, herein referred to as the "yield grade," and (2) characteristics of the meat which predict the palatability of the lean, herein referred to as the "quality grade." The grade of a bull carcass consists of the yield grade only. When officially graded, the grade of a steer, heifer, cow, or

jor wholesale cuts" in the standards with the list of "major wholesale cuts" in the letter's third paragraph shows that the rib and round are the same in both lists, but that the third paragraph (i) shortens the "sirloin, [and] short loin" of the standards to "loin," and (ii) shortens "square-cut chuck" to "chuck."

It is reasonable to assume that the letter's third paragraph uses the term "major wholesale cuts" to refer to the same cuts that are listed as "major wholesale cuts" in the standards since the letter's second paragraph refers to and cites the standards. Under the assumption that the letter and the standards both use the term "major wholesale cuts" to mean the same cuts, the term "chuck" in the third paragraph refers to "square-cut chuck," the *smallest* of the cuts referred to as "chuck." Hence this extrinsic aid to construction supports the same conclusion reached above from the intrinsic aids to construction.

To summarize, the intrinsic aids to construction show beyond any doubt that the term "chuck," as used in the third paragraph of the letter, refers to the square-cut chuck, and the extrinsic aid to construction supports that conclusion. Hence, the third paragraph is saying that a square-cut chuck is a *primal* cut. The *larger* arm chuck (which is a combination of the square-cut chuck and shank) cannot, therefore, be a *subprimal* cut.

Although it is not necessary to determine why Mr. Fuller used the shortened and ambiguous terminology of "(round, loin, rib, and chuck)" in the third paragraph of his letter to refer to the "primal cuts" and "major wholesale cuts," it is reasonable to infer that he

bullock carcass consists of both the quality grade and the yield grade. The yield grade designation may be removed from officially graded beef carcasses, sides, quarters, wholesale cuts, or combinations of wholesale cuts on which the external fat (natural or trimmed) does not exceed 3/4 inch in thickness. *For purposes of these regulations, wholesale cuts, or combinations thereof, which can qualify for yield grade designation removal are: Round, sirloin, short loin, rib, square-cut chuck, shank, brisket, plate, and flank.* The yield grade designation may be removed from all other cuts without trimming of external fat. In instances where removal of the yield grade designation is permitted, the USDA grade may consist of the quality grade designation only.

....

(g) ... Although entire carcasses with more than minor amounts of lean removed from the *major wholesale cuts* (round, sirloin, short loin, rib, or square-cut chuck) shall not be eligible for a grade determination, the remaining portions of these carcasses which are unaffected by the removal of lean shall remain eligible for a grade determination provided a cross section at the 12th-13th rib is available and an accurate grade determination may be made. (Emphasis added.)

was not specific in the third paragraph because he had already been specific in the second paragraph, and specificity with respect to the meaning of "round, loin, rib, and chuck" was not necessary to make the point that he was making in the third paragraph.

The primary import of the third paragraph of Mr. Fuller's letter is merely to exclude from the definition of "primal" the "shank, brisket, plate, and flank." This can be seen if we place in parallel columns the cuts of meat listed in the second paragraph of the letter as primals or wholesale cuts, and read the third paragraph with these columns in mind. The cuts listed in the following columns are taken verbatim from paragraph two of the letter, but the order of the wholesale cuts has been rearranged to correspond to the order of the "primals."

Primal and Wholesale Cuts as Listed
in Paragraph Two of Letter

Primal Cuts (as used in specifications)	Wholesale Cuts (as used in standards)
square-cut chucks	square-cut chuck*
ribs	rib*
trimmed full loins	—
trimmed short loins	short loin*
loin ends (sirloins)	sirloin*
rounds	round*
—	shank
—	brisket
—	plate
—	flank
	*Listed as "major wholesale cuts" in standards (7 C.F.R. §54.104(a)(1), 104(g) (1972)).

The first two sentences of the third paragraph of Mr. Fuller's letter, which should be read with reference to the foregoing columns, state:

We realize that some sources use the terms "primal" and "wholesale" interchangeably, listing all of our wholesale cuts as primals. However, in our standards and specifications we have always limited primal cuts to the major wholesale cuts (round, loin, rib, and chuck).

The second paragraph of Mr. Fuller's letter lists with precision the cuts referenced as primal cuts in the specifications and as wholesale cuts in the standards. The third paragraph states that although some sources regard "all of our wholesale cuts is primals," in "our standards and specifications we have always limited primal cuts to the major wholesale cuts. . . ." It would not have been necessary to repeat the list of primal cuts in the third paragraph since they are set forth with precision in the second paragraph. Similarly, it would not have been necessary to list the wholesale cuts referred to as "major wholesale cuts" since Mr. Fuller's point relates to *primals* rather than *major* wholesale cuts, and, as stated, the primals are set forth with precision in the second paragraph. (As paragraph one of the letter shows, Mr. Fuller was responding to the question posed to him regarding "the definitions of primal, wholesale [not major wholesale], subprimal, and retail cuts.") The only new information added by the first two sentences of the third paragraph relating to the question posed to Mr. Fuller is that the shank, brisket, plate, and flank, which are regarded as primals by some sources, are not regarded as primals in the Department's standards and specifications.

Since precision in listing the primal cuts or major wholesale cuts was not necessary to the point Mr. Fuller was making in the third paragraph, (unfortunately) he used the ambiguous term "chuck." However, as shown above, there is not the slightest basis for construing the term "chuck" in the third paragraph to mean anything other than the "square-cut chuck," the smallest cut referred to as "chuck." Thus the third paragraph, as well as the second paragraph, is saying that a square-cut chuck, the smallest of the cuts referred to as "chuck," is a *primal* cut. Hence plaintiff's *larger* arm chucks (consisting of the square-cut chuck and shank) cannot be *subprimal* cuts, under the Department's classifications.

II. INCONSISTENT ENFORCEMENT

Plaintiff's second item of newly discovered evidence, allegedly indicating that there is a lack of uniformity in the application of the trimming requirement, particularly between the Denver Main Station and Los Angeles Main Station areas, is of no consequence.

In the first place, plaintiff's affidavits are somewhat ambiguous. For example, the affidavit of Cal Santare states:

In that telephone conversation, Mr. Murphy stated to me that the Denver Main Station does not require trimming prior to the removal of yield grade designating on certain cuts of meat. . . .

3. Thereafter, in November, 1982, I called Dean Lowell of the U.S. Department of Agriculture and advised Mr. Lowell that in the Denver Main Station no trimming is required before the yield grade stamps are allowed to be removed on certain cuts of meat. I asked him to discuss this with Cal Faello of King Meat Packing Company.

Mr. Faello states in his affidavit with respect to his conversation with Mr. Lowell:

On or about November 15, 1982, Dean Lowell, National Technical Supervisor, U.S. Department of Agriculture, visited the King plant at his request to speak to me about grading. At that time and place he stated to me that it is the policy and practice in the Main Station of the U.S. Department of Agriculture at Denver not to require trimming of fat before yield grade designation may be removed on various cuts of meat, whereas it is the policy and practice at the Main Station in Los Angeles to require trimming before such removal. He thus stated that the Denver Main Station's and the Los Angeles Main Station's policies and practices under the Instruction on Removal of Yield Grade Stamps (at issue herein) differed.

Except for the last sentence quoted above, these statements merely imply, but do not expressly state, that Denver and Los Angeles apply the trimming requirement differently *on the same cuts of meat*. That is, except for the last sentence, the statements do not definitely state that Los Angeles requires trimming on the identical cuts of meat that are not required to be trimmed by Denver. Both areas properly do not require trimming "on various cuts of meat" that do not require trimming.

The last sentence, directly asserting a difference, obviously states Mr. Faello's conclusion, rather than Mr. Lowell's statement. This is shown by the use of "thus," *i.e.*, "He thus stated. . ." Hence the claimed discrepancy is not supported by clear-cut evidence.

Moreover, I infer that no one has indicated that there is any discrepancy in the practice between Denver and Los Angeles with respect to (i) whether arm chucks are subject to the trimming requirement before the yield grade may be removed without removing the quality grade,³ and (ii) the amount of trimming required on arm

³ There is now no basis for a difference of opinion as to whether arm chucks are subject to the trimming requirement since under the amendment effective October 6, 1980 (see 45 Fed. Reg. 51757, 51758 (1980)), it is expressly stated that the "square-cut chuck" and "shank," or "combinations thereof," are subject to the trimming requirement (7 C.F.R. §54.104(a)(1)(1982), quoted above in note 2). An arm chuck is, of course, a combination of a square-cut chuck and shank. The fact that under the language previously in effect there was a possible basis for a difference of

chucks. This inference is based on the fact that the affidavits refer merely to "certain cuts of meat" and "various cuts of meat," rather than to "arm chucks." Mr. Santare and Mr. Faello both testified for plaintiff in the administrative proceeding in this case. Both were undoubtedly seeking information which, *inter alia* (at least), could be used in the present proceeding. If they had received any information showing a conflict in practice as to beef arm chucks, their affidavits would not have referred to "certain cuts of meat," or "various cuts of meat," but, rather, would categorically have stated that there is a discrepancy as to beef arm chucks.

But even assuming that there is a discrepancy between Denver and Los Angeles, and that it relates to beef arm chucks, that is not helpful to plaintiff in this proceeding. The correct national policy was applied to plaintiff. If the correct grading procedures are not applied in the Denver area or in some other area, that is regrettable, and it is a subject that should receive the Department's prompt attention, but it is of no help to the plaintiff. As stated in *Dairy-men's League Coop. Ass'n, Inc. v. Brannan*, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949), involving alleged inconsistent application of a Department of Agriculture regulation:

Finally, the plaintiff complains that the administration of the Regulation has been unequal and inconsistent; not, as we understand, because it was deliberately partial, but because it has been wayward and vacillating. The plaintiff cannot, however, become the vicarious champion in its own interest of imperfections in the discharge of the Secretary's duties. If he has correctly interpreted his powers in dealing with it, and imposed upon it no greater obligations than were lawful, it is no answer that others have fared better; any more than when burdens have been unequally imposed by the mistakes of courts of law.

See also *Whitaker Cable Corp. v. F.T.C.*, 239 F.2d 253, 255 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 96-97 (D. Minn. 1945) (3-judge court) (evidence of violations by others is no help to violator proceeded against).

III. LIKELIHOOD OF FUTURE VIOLATIONS REDUCED

Mr. Faello's affidavit states that there are more graders available to monitor compliance than during prior years, and that the plaintiff

opinion as to whether arm chucks were subject to the trimming requirement is of no help to plaintiff since (i) the agency's interpretation of its own regulation was a reasonable interpretation, (ii) an agency's interpretation of its own regulation is controlling unless it is capricious, irrational or inconsistent with the regulation, and (iii) the administrative construction was brought to respondent's attention (see the final decision in this proceeding, 40 Agric. Dec. at 1484-93, slip op. at 25-37).

has established numerous safeguards and procedures to ensure that no future violations will take place. For example, it is plaintiff's present practice never to remove the yield grade stamp unless the quality grade stamp is also removed.

However, no matter how many graders are at a plant, the grading service cannot monitor every activity at a plant 24 hours a day and, therefore, in order to assure that the grading process is operated properly in the public interest, the Department must be able to rely upon the integrity of the plants receiving federal grading. As the Acting Administrator of the Food Safety and Quality Service stated in a policy statement published June 26, 1979 (44 Fed. Reg. 37322, 37323 (1979)):

[I]t is physically impossible for Federal inspection personnel to oversee all actions taken by operators and employees of federally inspected establishments. Great reliance must, therefore, be placed upon the integrity of these individuals. Similar reliance must be placed upon the integrity of those involved in the grading process operated under the AMA in order to insure that grading decisions are as accurate as possible and that consumers are accurately informed of the proper grades of products.

See also *In re Stevens Foods, Inc.*, 40 Agric. Dec. 1288, 1297 (1981); *In re Landmark Beef Processors, Inc.*, 40 Agric. Dec. 1074, 1083 (1981) ("The function of the grader is not that of a prison guard who is expected to scrutinize with apprehension every activity of persons under his charge"), appeal dismissed, No. CV 81-4695 (C.D. Cal. Feb. 12, 1982); *In re Mirman Brothers, Inc.*, 40 Agric. Dec. 201, 203-07, amended order, 40 Agric. Dec. 529 (1981).

In addition, although plaintiff has changed its practice so that the exact type of violation involved in this case is not likely to occur again, there are many other types of activities that can be engaged in by a meat plant to thwart the federal grading program. See, e.g., *In re Landmark Beef Processors, Inc.*, 40 Agric. Dec. 1074, 1076-87 (1981), appeal dismissed, No. CV 81-4695 (C.D. Cal. Feb. 12, 1982); *In re Mirman Brothers, Inc.*, 40 Agric. Dec. 201, 203-07, amended order, 40 Agric. Dec. 529 (1981); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1359-60 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981).

Accordingly, this "newly discovered evidence" would not change the sanction in this case. (The 12-month withdrawal of meat grading services is, of course, based on a prior consent decision, and is not subject to change by the Judicial Officer.)

IV. PLAINTIFF'S MOTIONS

Plaintiff has filed motions requesting an oral hearing, the taking of depositions and the supplementing of the record. I am not ruling on these motions since I regard them as beyond the scope of the remand order. This proceeding was remanded "for the limited purpose of considering plaintiff's 'newly discovered evidence.'" The Judicial Officer's decision and order in this case was not set aside, and the case was not remanded generally, but only for the limited purpose stated.

In construing the remand order, it is significant that the Government strongly objected to a hearing and taking of evidence at any remand, and argued that any remand should be limited to consideration of the " 'newly discovered evidence' which was the basis of plaintiff's motion for relief from judgment." Specifically, defendant stated in its opposition file March 17, 1983:

Defendants strongly object to the vastly broadened scope of the proceedings on remand directed by plaintiff's proposed Order. The sole purpose of any remand herein should be limited to consideration of the "newly discovered evidence" which was the basis of plaintiff's motion for relief from judgment. Plaintiff grossly overreaches by now proposing an Order that any remand proceedings be expanded to

"a hearing and taking of evidence on the definition of the terms 'primal', 'subprimal', 'wholesale', and 'retail' as defined by the subject regulations and administered by the Defendant herein and whether the cuts of meat involved herein were primal, subprimal, wholesale or retail."

Proposed "Order For Remand", 2. Plaintiff's Proposed Order far exceeds the basis of its motion for relief from judgment. The broadened scope of remand proceedings directed by the proposed Order would needlessly delay the resolution of this matter which commenced nearly five years ago.¹ The broadened remand now urged by plaintiff would burden these proceedings by further swelling the already turgid administrative record.

Defendants oppose any remand. However, should the Court conclude that a remand is appropriate, the defendants strongly urge that it be solely for the limited purpose of permitting the Judicial Officer to consider the "newly discovered evidence"

¹ The Administrative Complaint was filed April 18, 1978.

which was the basis for plaintiff's motion for relief from judgment.

The Court agreed with defendant, since the remand order is "for the limited purpose of considering plaintiff's 'newly discovered evidence.'" Accordingly, it would be beyond the scope of the remand order for the Judicial Officer to schedule an oral hearing in this case, further supplement the record or provide for the taking of depositions.

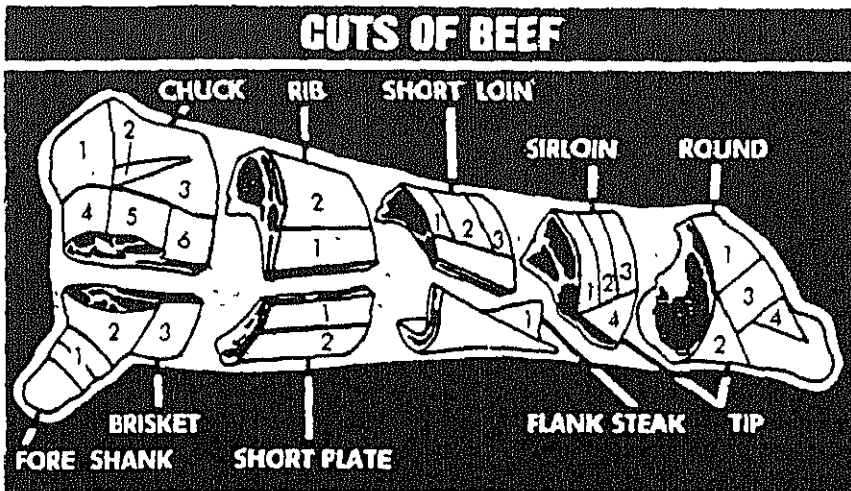
But, even if plaintiff's motions were not beyond the scope of the remand order, I would deny them (unless *ordered*, otherwise by the remand order) since, for the reasons set forth above, plaintiff has made no showing that any additional evidence could be of any possible benefit to plaintiff's case.

ORDER

It is determined on the basis of a consideration of plaintiff's "newly discovered evidence" that such evidence offers no support whatever to plaintiff's position in this case and would not have changed the outcome of this proceeding in any manner. It is further determined that the "newly discovered evidence" does not indicate that a further hearing to explore such evidence in greater detail would be beneficial to plaintiff's position.

Copies of this document shall be served upon the parties, and a copy shall be forwarded to Honorable Richard A. Gadbois, Jr., United States District Judge, United States District Court, Central District of California, U.S. Courthouse, Los Angeles, California 90012.

APPENDIX



CHUCK 1) Neck 2&3) Inside Chuck Roll; Blade Pot-roast or Steak 2) Chuck Tenderloin 3) Petite Steaks 4&5) Arm Pot-roast or Steak 5) Boneless Shoulder Pot-roast or Steak 6) Cross-rib Roast.

RIB 1) Short Ribs 2) Standing Rib Roast, Rib Steak, Boneless Rib Steak, Delmonico (Rib Eye) Roast or Steak

SHORT LOIN 1) Club Steak, 2) T-bone Steak 3) Porterhouse Steak 1, 2&3) Top Loin Steak 2&3) Filet Mignon, Tenderloin Steak

SIRLOIN 1) Tenderloin Steak, Pin Bone Sirloin Steak 2) Flat Bone Sirloin Steak 3) Wedge Bone Sirloin Steak 1, 2&3) Boneless Sirloin Steak

ROUND 1) Standing Rump, Rolled Rump 2) Round Steak, Top Round Steak, Outside (Bottom) Round Steak or Pot Roast, Eye of Round 4) Heel of Round

FORE SHANK 1) Shank Cross Cuts 1&2) Beef for Stew (also from other cuts)

BRISKET 3) Fresh & Corned Brisket

SHORT PLATE 1) Short Ribs 1&2) Skirt Steak Fillets, Rolled Plate, Plate Beef

TIP (KNUCKLE) 2&4) Tip Steak, Sirloin Tip, Cube Steak

SOURCE: NATIONAL LIVE STOCK AND MEAT BOARD

Source: The Washington Post, June 5, 1983 (Food section), at H-1.

(No. 22,532)

In re: UNITED DAIRY FARMERS COOPERATIVE ASSOCIATION. AMF
Docket No. M 36-9. Decided May 10, 1983.

Properly treated as a handler—Charge on overdue accounts—Alteration or modification of obligations under marketing order—Petition dismissed.

Petitioner was treated properly as a handler instead of a Capper-Volstead cooperative. Petitioner did not pay, as required, for about two-thirds of the milk received from producers in June 1980. Therefore petitioner is obligated to make late payments to the market administrator including a charge on overdue accounts. The milk marketing order requires that late payments be made to the market administrator's office. Petitioner's membership cannot change, modify or nullify that obligation. Petition was dismissed with prejudice.

John M. Silvestri, Pittsburgh, Pennsylvania, for petitioner.
Donald Tracy, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This Petition¹ was filed by United Dairy Farmers Cooperative Association (UDF; Co-op) for the purposes of (1) establishing a factual status to achieve retroactive qualification under the Capper-Volstead Act, 7 USC 291 *et seq*, (2) to challenge charges on overdue accounts assessed by the Market Administrator under the Federal Milk Marketing Order No. 36, 7 CFR 1036 (order) and (3) to determine whether or not Petitioner's members could retroactively nullify or modify an obligation of Petitioner for the payment of milk handled under the Order in June 1980. (Tr pages 5 & 6)

Respondent takes issue with these contentions averring that (1) Petitioner factually did not meet Capper-Volstead standards at the time in question and retroactive qualification under Capper-Volstead is not possible, (2) that charges on overdue accounts are in accordance with the lawful requirements of the Order and (3) that Petitioner's members cannot alter or modify obligations created under the Order.

¹ Section 8c(15)(A) authorizes handlers regulated under the Order to challenge the lawfulness of, or any obligation imposed under, federal marketing orders. 7 USC 608c(15)(A). See Vetne, "Federal Marketing Order Programs" in 1 Davidson, Agricultural Law, Chapter 2 (1981).

Trial of the issues took place in Pittsburgh, Pennsylvania on December 8, 1982. The last brief was filed February 14, 1983.

* * *

Petitioner operated a pool plant (7 CFR 1036.7) marketing milk under the Order for its members and was a handler of that milk (7 CFR 1036.9).

Petitioner did not pay for about two-thirds of the milk received and handled by Petitioner in June 1980.²

The Order was amended effective July 1, 1980 (45 FR 36354, 5/30/80) but none of the amendments are relevant or material here.

Late payments by a handler (before or after July 1, 1980) for milk had to be made to the Market Administrator. 7 CFR 1036.73(c); 45 FR 18013, 18015-18019 (3/20/80).

Payment to producers of a qualified Capper-Volstead cooperative (before or after July 1 1980) have to be made to the Market Administrator. 7 CFR 1036.71; 45 FR 18013, 18015-18019 (3/20/80)

If Petitioner was then a qualified Capper-Volstead cooperative for the two-thirds (2/3rds) balance of the June 1980 milk, payment had to be made to the Market Administrator's office.

If Petitioner was not then a qualified Capper-Volstead cooperative, it was merely a handler who was required to make any late payments to the Market Administrator's office.

Here, Petitioner failed to pay for about two-thirds (2/3rds) of the milk handled in June 1980.

Payment for this milk was required to be made to the Market Administrator's office under either alternative relevant here. That is, if Petitioner was a handler (not qualified as a Capper-Volstead cooperative) making late payments to his producers or if Petitioner was a qualified Capper-Volstead cooperative.

Petitioner *first applied* for status as a Capper-Volstead cooperative in February 1981, more than six months after the failure to pay for the June 1980 milk.

Even then, Petitioner failed to meet the standards to qualify as a Capper-Volstead cooperative because of the status or activities of three co-op members (all of whom were *also* members of Petitioner's Board of Directors).

The first was not a "producer" and was not marketing milk through the Petitioner. Another, while a Board member, was selling eggs to Petitioner and a third, also a Board member, was

² The Petitioner's bank accounts were frozen on July 3, 1980.

charging Petitioner a brokerage fee for selling surplus milk to cheese plants.

A member of a cooperative (not to even mention a member of its Board of Directors) who was *not a producer* of that commodity, violates the Capper-Volstead requirement that it be an association of producers and that the association be "operated for the mutual benefit of the members thereof, as such producers. . . ." 7 USC 291.

The second was selling eggs to Petitioner for resale in Petitioner's retail stores. The third was charging Petitioner a brokerage fee for selling surplus milk to cheese plants. Each created a conflict of interest between his personal gain and the best interests of the co-op.

A nonproducer can have no "mutual benefit" with producer members, and a nonproducer as a member of the Board of Directors only aggravates the conflict.

The two board members who were engaged in business activities with or on behalf of the Petitioner had an inherent conflict of interest between their personal gain and the mutual benefit of all members of the association. Board members have a status whereby information, contacts and personal relationships, both formal and informal, when coupled with a Board vote, give a personal advantage, whether exploited or not, over all other members of the association.

The nonproducer member resigned as a member of the association (and the Board) and the other two members resigned their Board membership (while remaining co-op members).

Thereafter, in May 1981, Petitioner qualified for and was granted qualified status as a Capper-Volstead cooperative.

This record does not indicate that Petitioner qualified for such status at any time prior to the time it was granted in May 1981.

Therefore, as of June and July 1980 when Petitioner failed to pay for all of its June 1980 milk, Petitioner was a handler of milk and was obligated to make any late payments to the Market Administrator's office.

Thus, under the terms of the Order, obligation to pay for the June 1980 milk was Petitioner's obligation to the Market Administrator's office.

A special meeting of the co-op membership was held in early July 1980 concerning the critical financial situation. The membership unanimously voted to "relinquish two-thirds of their June, 1980 milk check." Tr Page 50. \$1,112,479.67 was unpaid at that time.

However, the obligation for the unpaid June 1980 milk ran to the Market Administrator under the terms of the Order, not to Peti-

tioner's membership. Thus, in effect, Petitioner's membership were unilaterally trying to modify, alter or nullify the provisions of Federal Milk Marketing Order No. 36.

Prompt and timely payment of obligations under that Order is important. Terms of the Order are formulated in formal rulemaking procedures during which the industry and all interested persons are invited and do participate fully and vigorously. The terms and provisions of the Order are legally binding upon all who produce and market milk under that Order.

Only an absence of substantial evidence in the rulemaking record to support a provision, or a factual or legal error in the application of the provisions, can bring relief from the operation of the Order provisions.

Here, Petitioner, a handler who was not a qualified Capper-Volstead cooperative, failed to make timely payment to its producers for June 1980 milk. In addition, Petitioner has failed to make a series of payments to the Market Administrator's office due for the handlers equalization fund, marketing services and administrative expenses for the months January 1981 through August 1981.

Those payments, as well as the payment due for the June 1980 milk, were all subjected to the one percent per month charge on overdue accounts as follows: handlers equalization fund, \$207,443.09; marketing services, \$1,135.33; and administrative expenses, \$544.88, totaling \$209,123.30 charges on overdue accounts for the period in question.

The unpaid June 1980 milk and the other unpaid accounts from January through August 1981, made a grand total of \$1,534,885.08 (including the charges on overdue accounts).

In February 1979, before the triggering events in controversy here, the Market Administrator's office had obtained a judgment in the United States District Court for the Western District of Pennsylvania against Petitioner in the amount of \$7,469.93. A supplemental judgment was thereafter entered in October 1981 against Petitioner for the \$1,534,885.08.

Petitioners contend that the "charge on overdue accounts" (7 CFR 1036.78) is the "equivalent to interest." Without further support, Petitioners contend that this one percent monthly charge on overdue accounts is improper and illegal because it is in violation of the United States Code (5 USC 1961). This statutory provision limits interest on any money judgment in a civil case to a rate allowed by State law. Petitioners argue that the Pennsylvania statute (41 P.A.S. 202) is applicable and specifies six percent per annum. However, that section carries the provision limiting its application to ar-

rangements which call for payment of interest, but fail to specify any particular rate of interest.

Petitioner has the burden of proof to establish its contention that the "charge on overdue accounts" is "interest."

A review of the rationale concerning the "charges on overdue accounts" provision in the rulemaking decision (45 FR 18013, 18019-18020, (3/20/80)) show that the timing, scope, impact, rate, payor and payee were all considered and evaluated in the context of encouraging and compelling prompt payment under the Order. There was no consideration whatsoever of the appropriate "cost" to use someone else's money for a period of time as is a characteristic of "interest."

Petitioners failed to show that "charges on overdue accounts" are "interest." Further, Petitioner's statutory references muddy the picture for they specifically refer to postjudgment obligations stemming from a District Court judgment, and situations where no "rate" of interest is specified.

Although, Petitioner's authority refers to postjudgment obligations, Petitioner asks that "[t]herefor, this Court must order the abatement of the judgment with respect to interest." Petitioner's Opening Brief, page 5, filed January 10 1983. In fact, it seems clear that Petitioner's main thrust is directed to the "interest" or charges on overdue accounts included in the District Court Supplemental Judgment entered in October 1981 and not to postjudgment "interest" or charges on overdue accounts.

All that can be said at this time, is that this record does not establish any basis to exempt Petitioner from the provisions of the Order requiring one percent per month charge on overdue accounts.³

Petitioner has failed to establish any legal or factual grounds to obtain relief from the charges on overdue accounts as assessed by the Market Administrator.

Lastly, Petitioners argue that Petitioner's membership at the early July special meeting called to consider the financial crisis relinquished any right to the unpaid money for the June 1980 milk. This, in effect, Petitioner's reason wiped out the obligation of Petitioners for that milk and therefore, there was no basis for the

³ Neither party has raised nor discussed the issue of this indirect attack in an administrative adjudicatory proceeding on the substance of a decision entered in the United States District Court. At first blush, it would appear that such factual matters necessary for that judgment become *res judicata*.

No authority or jurisdiction is known to exist here and none has been pointed out to either "abate" the judgment or order the Secretary of Agriculture to file "satisfaction of judgment" as urged by Petitioners.

\$1,112,479.67 for the June 1980 milk as a part of the District Court supplemental judgment entered in October 1981. Petitioners ask that the judgment "be abated in that amount." Petitioner's Opening Brief, page 8, January 10, 1983.

Petitioner completely fails to assess the rights and duties of the various parties under the milk marketing Order and fails to recognize the interrelated obligations of the handlers, producers, qualified cooperatives and the Market Administrator's office.

Petitioner's arguments are based mainly on common law understandings and unregulated commercial arrangements and are to that extent inappropriate and irrelevant.

The terms of the Order are binding by law on all of the parties as long as there is substantial evidence in the rulemaking record supporting that provision⁴ and there are no legal or factual errors in the application of the provision. They cannot be modified, altered or changed by unilateral action of anyone.

Petitioners have the burden of proof and have failed to show any legal, interpretative or factual error in the application of any of the Order provisions here.

The Order requires that late payments be made to the Market Administrator's office, as well as all payments due to a Capper-Volstead qualified cooperative association members. There is no way for the association members to change, modify or nullify that obligation to the Market Administrator's office.

Petitioner has the burden of proving that the application of the Order was not in accordance with law. *Bordens v. Baldwin*, 293 US 193, 209 (1934); *United States v. Rock Royal Co-op, Inc.*, 307 US 533, 567, 568 (1938).

Petitioner has not established any legal or factual error here. Petitioner merely asserts and reasserts its position and makes arguments based on those self-serving assertions which are not in accordance with the strongly persuasive and convincing evidence here or the applicable law.

As an afterthought, Petitioner in its Reply Brief, page 5, suggests that Petitioner might have elected to operate as a "non-pool" plant during the disputed time and therefor might have different privileges and obligations. This would be highly speculative. What might have been done if some other status existed is irrelevant and immaterial.

⁴ There is no challenge to the rulemaking proceedings and no claim that the relevant provisions are lacking in substantial evidence to support them.

Petitioner, here, seeks to accomplish goals that are both legal and factually impossible to achieve.

★ ★ ★

The Market Administrator acted properly, in treating Petitioner as a nonqualified Capper-Volstead cooperative in June and July 1980. Petitioner did not pay either the Market Administrator or producers \$1,112,479.67 for the value of milk it received from producers in June 1980. Petitioner's membership in attempting to nullify Petitioner's obligation for milk delivered and handled by Petitioner in June 1980 is a nullity. A one percent per month charge on overdue accounts of Petitioner was properly assessed by the Market Administrator.

★ ★ ★

ORDER

The Petition is dismissed with prejudice.

Copies shall be served on the parties. The decision and Order become final and effective 35 days after service unless there is an appeal filed within 30 days of service. (7 CFR 900.64(c) 900.65(a)). (This decision and order became final June 20, 1983.

(No. 22,533)

In re: DE GRAAF DAIRIES, INC. AMA Docket No. M 2-74. Decided June 29, 1983.

Producer—Settlement fund, audit adjustments—Proceeding remanded to Administrative Law Judge.

The Judicial Officer vacated the initial decision filed April 27, 1983 and the proceeding was remanded to the Administrative Law Judge for a determination of the matter on the merits. Once a Market Administrator files timely audit adjustments the two year limitation period applicable to all milk marketing orders does not preclude the Market Administrator from issuing revised audit adjustments less than the initial audit adjustments.

Kenneth S. Goldrich, Paramus, New Jersey, for petitioner.

Gregory Cooper, for respondent.

John G. Liebert, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND REMAND ORDER

This is a proceeding under §8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §608c(15)(A)). It was instituted by a petition filed by De Graaf Dairies, Inc., a "handler" of milk in New Jersey under Federal Order No. 2 (7 C.F.R. §1002 *et seq.*), which regulates the handling of milk in the New York-New Jersey Marketing Area.

Petitioner challenges certain audit adjustments issued by the Market Administrator of Order No. 2 covering petitioner's monthly obligations to the Producer-Settlement Fund and for Administrative Assessments for the period from January 1976 through June 1980.

The original audit adjustments were based on the "container method" involved in *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388 (1982), *aff'd*, No. 82-1157 (D. N.J. Jan. 24, 1983), *appeal docketed*, No. 83-5098 (3d Cir. Feb. 9, 1983). In that case, the Judicial Officer held that the "container method," utilized by the Market Administrator to determine De Graaf's obligations from July 1968 through December 1975, was defective. However, the Judicial Officer suggested a different procedure for determining De Graaf's obligations, and requested the Market Administrator to recompute De Graaf's obligations under the new procedure. The Judicial Officer upheld the Market Administrator's revised determinations as to De Graaf's obligation, which were much less than the original determinations.

Following the Judicial Officer's decision in the first *De Graaf* case, the Market Administrator issued revised audit adjustments as to De Graaf's obligations for the period January 1976 through June 1980 not based on the "container method." The revised audit adjustments were much less than the original audit adjustments.

On April 27, 1983, Administrative Law Judge John G. Liebert granted petitioner's request for summary judgment on the ground that the revised audit adjustments were barred by the 2-year limitation period applicable to all milk orders (7 C.F.R. §1000.6). On May 20, 1983, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§556 and 557 (7 C.F.R. §2.35).¹ The case was referred to the Judicial Officer for decision on June 27, 1983.

¹ The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with

Respondent requests oral argument before the Judicial Office but since the issue is not complicated, the record is not voluminous and the matter has been fully briefed, oral argument would seem serve no useful purpose.

The "statute of limitations" involved on appeal provides (7 C.F. § 1000.6):

§ 1000.6 Termination of obligations.

The provisions of this section shall apply to any obligation under the order for the payment of money:

(a) Except as provided in paragraphs (b) and (c) of this section, the obligation of any handler to pay money required to be paid under the terms of the order shall terminate 2 years after the last day of the month during which the market administrator receives the handler's report of receipts and utilization on which such obligation is based, unless within such 2-year period, the market administrator notifies the handler in writing that such money is due and payable. Service of such written notice shall be complete upon mailing to the handler's last known address and it shall contain but need not be limited to the following information:

- (1) The amount of the obligation;
 - (2) The month(s) on which such obligation is based;
- and
- (3) If the obligation is payable to one or more producers or to a cooperative association (except an obligation to be prorated to producers under an individual handler pool), the name of such producer(s) or such cooperative association, or if the obligation is payable to the market administrator, the account for which it is to be paid;

(b) If a handler fails or refuses, with respect to any obligation under the order, to make available to the market administrator all records required by the order to be made available, the market administrator may notify the handler in writing, within the 2-year period provided for in paragraph (a) of this section, of such failure or refusal. If the market administrator so notifies a handler, the said 2-year

the Department's regulatory programs since 1949 (including 3 years' trial litigation 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

period with respect to such obligation shall not begin to run until the first day of the month following the month during which all such records pertaining to such obligation are made available to the market administrator;

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under the order to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed; and

(d) Unless the handler files a petition pursuant to section 8c(15)(A) of the Act and the applicable rules and regulations (7 CFR 900.50 et seq.) within the applicable 2-year period indicated below, the obligation of the market administrator:

(1) To pay a handler any money which such handler claims to be due him under the terms of the order shall terminate 2 years after the end of the month during which the skim milk and butterfat involved in the claim were received; or

(2) To refund any payment made by a handler (including a deduction or offset by the market administrator) shall terminate 2 years after the end of the month during which payment was made by the handler.

The purpose of the "statute of limitations" is to prevent a handler from being surprised by audit adjustments made more than two years after the handler's report and, conversely, to prevent the Market Administrator from being surprised by a handler's claim to be entitled to a payment or refund more than two years after the relevant event. However, once the handler is put on notice by the timely filing of an audit adjustment, there is nothing in the letter or the spirit of the "statute of limitations" to prevent the Market Administrator from revising the audit adjustment so as to assert a lesser claim against the handler.

For the purposes of the present proceeding, it need not be decided whether the Market Administrator could, more than two years after the handler's report, issue revised audit adjustments greater than the original audit adjustments. Here the Market Administrator's revised audit adjustments are substantially less than his original audit adjustments, and, therefore, it is not necessary to determine whether increased audit adjustments would have been barred by the 2-year limitation period.

Judge Liebert relies on the fact that in the first *De Graaf* case, the Judicial Officer stated (41 Agric. Dec. at 407):

Petitioner's fraudulent conduct and deliberate concealment of facts also avoid the usual 2-year limitation period as to adjustments to a handler's obligations under a milk order (7 C.F.R. §1000.6(c)).

In the first *De Graaf* case, fraud and deliberate concealment were required to toll the 2-year limitation period because some of the Market Administrator's audit adjustments were made more than two years after the handler's reports were filed, and there had been no prior, timely audit adjustments for the time period involved. Accordingly, except for *De Graaf's* fraud and deliberate concealment, the audit adjustments would not have been timely.

But *De Graaf's* fraud and deliberate concealment of facts were not relied upon to support the Judicial Officer's modification of the audit adjustments. The Judicial Officer's modification was based on the statutory authority (7 U.S.C. §608c(15)(A)) to modify a Market Administrator's determination as to a handler's obligations under the order (41 Agric. Dec. at 429-30.)

Judge Liebert states that if the Market Administrator has the power to issue revised audit adjustments, the Market Administrator could completely avoid the 2-year limitation period by issuing notices of adjustments to all handlers every month. However, those hypothetical facts are not involved here. Moreover, the hypothesis assumes irresponsible and capricious conduct by the Market Administrator.

In the present case, the Market Administrator's original, timely audit adjustments were based upon the "container method." Although it was held in the first *De Graaf* case that the "container method" was flawed, the decision indicated that the "container method" might be used by the Market Administrator if the flaws were corrected (41 Agric. Dec. at 408 n. 16). Hence the Market Administrator's conduct in basing his original audit adjustments on the container method was reasonable. Similarly, the issuance of revised audit adjustments after the container method was found to be faulty in the first *De Graaf* case was also reasonable, and not conflictive with the letter or spirit of the "statute of limitations."

For the foregoing reasons, the initial decision should be vacated and the proceeding should be remanded to Judge Liebert for a determination on the merits. Since the revised audit adjustments do not embody the container method, which was challenged in the original petition filed by *De Graaf*, *De Graaf* should be afforded a rea-

sonable time within which to amend its petition to be responsive to the revised audit adjustments.

ORDER

The initial decision filed April 27, 1983, is hereby vacated and the proceeding is remanded to the Administrative Law Judge for a determination of the matter on the merits. The Administrative Law Judge should permit the petitioner to amend its petition to be responsive to the Market Administrator's revised audit adjustments.

(No. 22,534)

In re: AEROMECH AIRLINES, AWA Docket No. 221. Decided May 1983.

Transportation of animals in improper enclosures—Civil penalty—Consent

Respondent consented to the entry of this decision and order in which they were assessed a civil penalty for transporting rabbits in primary enclosures not in compliance with standards issued pursuant to the Act.

Morris L. Selinger, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Animal Welfare Act amended (7 U.S.C. 2131 *et seq.*) by a complaint filed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent has violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (7 CFR 1.13).

The respondent, admits the jurisdictional allegations of the complaint, specifically admits that the Secretary has jurisdiction in this matter, and consents and agrees for the purpose of settling this proceeding to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent, Aeromech Airlines, is a corporation whose principal address is Benedum Airport, P.O. Box 2650, Clarksburg, West Virginia 26301.

2. At all times material herein, respondent was registered under the Act as a "carrier."

3. On March 25, 1982, respondent transported 12 rabbits from Parkersburg, West Virginia, to National Airport outside of Washington, D.C., in primary enclosures which did not conform to the standards issued pursuant to the Animal Welfare Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts alleged in the complaint and the parties having agreed to the entry of this decision without further procedure, such decision will be entered.

ORDER

Respondent, Aeromech Airlines, is assessed a civil penalty of \$150 which shall be payable to the Treasurer of the United States by certified check or money order and forwarded to Morris L. Selinger, Office of the General Counsel, United States Department of Agriculture, Room 2008, South Building, Washington, D.C. 20250, within thirty (30) days from the date this order becomes effective.

This Order shall have the same force and effect as if entered pursuant to a full hearing and shall be final upon issuance and effective upon service of the decision upon respondent.

(No. 22,535)

In re: TRANS WORLD AIRLINES, INC. AWA Docket No. 223, Decided May 24, 1983.

Civil penalty—Consent

Respondent consented to the entry of this decision and order in which they were assessed a civil penalty of \$1,000.

Patricia V. Fettmann, for complainant.

Ulrich V. Hoffmann, New York, New York, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, and waives hearing and further procedure herein. Complainant and respondent consent to the issuance of the following order:

ORDER

A civil penalty of \$1,000 is assessed against respondent. Respondent shall send a certified check or money order for that amount payable to the Treasurer of the United States to Robert A. Ertmer, Attorney, Marketing Division, Office of the General Counsel, Room 2014-S, U.S. Department of Agriculture, Washington, D.C. 20251 within 30 days of the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

(No. 22,536)

In re: B. D. SORELL. AWA Docket No. 196. Decided April 22, 1982

Outdoor facilities—Watering—Sanitation—Cease and desist order

Respondent kept four bears at an exhibition facility at Corinth, Mississippi. During four inspections conducted during 1981 respondent was found to be in violation of the standards issued pursuant to the Act in that there was insufficient drainage to rapidly eliminate excess water, the water receptacles were not kept clean and sanitary, the premises were not kept clean, and a safe and effective program for control of pests was not established and maintained. Respondent was ordered to cease and desist from failing to comply with the requirements of the Act and its standards.

Gregory Cooper, for complainant.

Philip N. Elbert and Robert L. Sullivan, Nashville, Tennessee, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative proceeding under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*, hereinafter referred to as the "AWA") and the regulations and standards issued pursuant to the Act (42 CFR Part 3). This proceeding was instituted by a complaint filed March 29, 1982, by the Acting Administrator of the Animal Plant Health Inspection Service, United States Department of Agriculture. Respondent filed an answer on April 22, 1982, generally admitting the jurisdictional allegations contained in the complaint while denying others which alleged violations of the Act.

A hearing was held in this proceeding on August 24, 1982, in Nashville, Tennessee. Gregory Cooper of the Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant. Philip N. Elbert and Robert L. Sullivan

the firm of Neal and Harwell, Nashville, Tennessee, appeared on behalf of the Respondent. At the close of the hearing, the time was set for the filing of briefs.

FINDINGS OF FACT

1. B. D. Sorell, hereinafter referred to as the respondent, whose address is Route 2, Box 280, White House, Tennessee 37188, is an individual doing business as Jolly Joe's and as Loco Joe's.

2. Respondent is now, and at all times material herein was, engaged in business as a licensed exhibitor within the meaning of sections 2 and 3 of the Act (7 U.S.C. §§2132 and 2133).

3. Respondent, at the time of licensing, agreed to comply with the requirements of the Act and the regulations and standards thereunder. As a licensed exhibitor, Respondent is required to comply with all lawful regulations and standards properly promulgated thereunder.

4. Respondent, at all times material herein, kept four bears at an exhibition facility called Loco Joe's, at Highway 72 West, Corinth, Mississippi, as he was authorized to do by his exhibitor's license.

5. On June 25, 1981, August 17, 1981, September 29, 1981, and November 30, 1981, Respondent's facility at Corinth, Mississippi, was inspected by USDA Veterinary Medical Officer A. H. Ward. On the last three occasions Dr. Ward was accompanied by USDA Compliance Officer Doyle Wooldridge. On all four occasions, immediately upon completion of the inspection, Dr. Ward filled out an inspection form listing various deficiencies and discussed these deficiencies with Talmadge D. Curtis, an employee of Respondent in charge of managing the facility. A copy of the inspection form was also left with Mr. Curtis on all four occasions. Immediately after the August 17, 1981, inspection, Dr. Ward also talked on the phone with the Respondent and explained the deficiencies to him. On the three occasions when he was present, Mr. Wooldridge took photographs of the facility. (Cx 5-24).

6. Respondent's facility in Corinth, Mississippi, consists of two bear cages. One cage has a metal floor and heavy metal bars for walls, and is approximately 20 feet long, 12 feet wide and 9 or 10 feet tall. This cage has a movable dividing wall in the middle with one bear on each side.* To contain the bear's drinking water, the metal cage had one big bathtub and two small metal containers, each approximately 1 foot by 1 foot and 4 or 5 inches deep.

Approximately 10 feet south of the metal cage is the other bear cage. The second cage has a concrete slab floor and chain link fence walls and is approximately 12 feet wide by 16 feet long and 8 feet high. This cage has no divider and contains two bears. The drinking

water in this chain link cage is provided by one receptable bathtub.

Each of the two cages has a solid covering on its top. An awning or plywood overhang was added to the west side of each cage.* The overhangs extend 3 to 4 feet beyond the outside wall of the cage and extend straight out (rather than tilt down).

Surrounding both cages at a distance of about 4 feet is an 8 foot high chain link perimeter fence with gates.* The fence was under construction at the time of the August 17, 1981 inspection and although it was completed before the September 29, 1981 inspection, the disruption of the premises, brought about by the work on the fence, including the employment of a bulldozer to move the all metal cage, had not been corrected at that time.

At some distance to the south and east of the cages are two highways. Although the area around the cages is relatively flat, the ground to the east of the cages eventually slopes down towards the highway. Across the highway to the east are single family houses at some distance to the west of the facility is a two or three story retail store owned by Respondent. The store ran generally parallel to the large metal cage and did not reach as far south as the chain link fence cage.

7. At the time of all four inspections, drainage was inadequate to rapidly eliminate excess water. Near each of the cages were several earthen drainage ditches which eventually sloped down to the northern end of the property. At approximately 8 a.m. and 5 p.m. each day both cages are hosed out. At least some of the water and excrement merely flows out of the sides of the cages onto fairly level ground. Other of the water and excrement flow out towards the drainage ditches. It appears that not all of this water and excrement reach the drainage ditches, or if it reaches the drainage ditches, does not completely drain away because the ditches are not sufficiently sloped, and are not made of impervious material. Adequate drainage is necessary to prevent a health hazard and to prevent a breeding ground for insects. The inspections on all four occasions took place in the late morning or early afternoon. Standing water and excrement were found.

8. At the time of all four inspections the water receptacles were not kept clean and sanitary. The water receptacles in question were the bathtubs located in each cage. In one cage the tub is the source of drinking water, and in the other, it was an alternative source to two small metal receptacles. Since the bears would climb into the tubs to play or cool off, there was always dirt being brought

*Indicates eventual improvements made by Respondent in response to Complainant's inspection/deficiency report of June 25, 1981 (Cx 1).

into the tubs. While the tubs were hosed out twice a day, no adequate means were taken to clean the tubs. Both the testimony and photos indicate the presence of algae and slime in the tubs.

9. At the time of all four inspections, the premises around the cages were not kept clean. The testimony and photos in evidence show that grass and weeds were allowed to grow high around the cages. This furnished a breeding ground for insects. In addition, debris of various types was scattered over the area. However, later photographs of Respondent's premises (Rx 6-15, 18-21) show improvement in this area in 1982. Goats used by Respondent to "police the area," appear to be effective.

10. At the time of all four inspections, there was no effective program for the control of pests. A photo received in evidence shows the existence of small holes at the base of the chain link cage (Cx 24). Complainant contends that the holes were obviously caused by the burrowing of small animals, like rats or mice. Respondent's witness testified that the holes were inhabited by cats raising litters of kittens underneath the bear cages. From an examination of Complainant's exhibit 24, the holes appear to be too small to accommodate a full grown cat, about to give birth to kittens.

Later, reports of Dr. Ward reflect that pest control was adequate, and the premises was sufficiently clean in 1982. Tr. 49-52, Rx 4 & 5.

11. At the time of the June 25, 1981 inspection, there was insufficient shade to allow the bears to protect themselves from direct sunlight. In this area of Mississippi, it is often 95° to 100° during the summer. At the time of the June 25, 1981 inspection, the roof on each cage reached only to the wall of the cage. By the time of the September 29, 1981 inspection, plywood overhangs had been added on the west side of each cage. However, as noted earlier in Finding 6, these overhangs extended approximately 3 to 4 feet and went straight out, rather than being tilted down. Complainant speculates that both cages would be fully covered by sunlight by 2 or 3 p.m. in a summer afternoon. However, complainant made no inspection at 2 or 3 in the afternoon or at any time when the cages were completely filled with sunshine.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

7 U.S.C. 2149 provides, in part:

(b) Any dealer, exhibitor . . . that violates any provision of this Act, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by

the Secretary of not more than \$1,000 for each such violation and the Secretary may also make an order that such person shall cease and desist from continuing such violation . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

Section 3.127 of the standards, *Facilities, outdoor* (9 CFR 3.127) provides, in part:

(a) *Shelter from sunlight.* When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight . . .

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. . . .

Section 3.130 of the standards, *Watering* (9 CFR 3.130) provides, in relevant part, that:

. . . All water receptacles shall be kept clean and sanitary.

Section 3.131 of the standards, *Sanitation* (9 CFR 3.131) provides, in relevant part, that:

(c) *Housekeeping.* Premise (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

CONCLUSIONS

There are five areas for consideration:

1. Insufficient drainage
2. Nonsanitary water receptacles
3. Unclean premises
4. Inadequate pest control
5. Insufficient shade

Items 1 and 2 were in evidence during the four 1981 inspections noted in the findings of fact, and remain as of the time of hearing. Items 3 and 4 were present during the four 1981 inspections,

have been rectified in 1982. Item 5 was not supported by the evidence.

1. Drainage.

Respondent, on or about June 25, 1981, August 17, 1981, September 29, 1981 and November 30, 1981, was in violation of section .127(c) of the standards (9 CFR 3.127(c) in that there was insufficient drainage to rapidly eliminate excess water at respondent's outdoor facility.

Dr. Ward testified that on June 25, 1981, he found inadequate drainage outside of the cages. He explained that when the floors of the cages are washed out, the water and the excreta just fall out the sides onto the ground. He stated that this problem also existed on his inspections of August 17, September 29, and November 30, 1981. Dr. Ward explained that every time he has been at Respondent's facility, there has been standing water outside of the cages. He stated that the excreta and water is supposed to make its way to the ditch, but that not all of it got there since the ground was somewhat level. What reached the ditch did not always flow away since the ditch was not impervious and sufficiently sloped. He stated that the standing water and excreta would encourage insect breeding and be a pollution hazard. He explained that he had found signs of larvae and insect infestation. On the three occasions he was present, during the August, September, and November inspections, Mr. Wooldridge took photographs that showed the drainage problem.

Around the time of the August inspection there was much ground upheaval because of the construction of the perimeter fence, which mitigates the violation of August 17, 1981. However, the fence was in place by the September 29 inspection and the construction does nothing to mitigate the violations of June 25, September 29, and November 30, 1981.

However, there is a further consideration.

Respondent was informed by Dr. Ward, during his inspections, that the drainage system should be linked to a sewer line or that a siphon system be installed. (Cx 3, and 4). Dr. Ward testified to that effect at the hearing, Tr. 53, 140.

Complainant on the otherhand does not espouse this position. Brief p 15. The complainant's brief states:

"It should be made perfectly clear that this is not the Department's position on this matter. The complainant's position is that water and excreta do not all make their way to the drainage ditch and, even if they did arrive at the drainage ditch, would not all drain away because the drainage ditch is not made of impervious material and is not sloped sufficiently."

While Dr. Ward's recommendation (sewer line/septic tank) may have been the ideal solution to the drainage condition, its resolution must be left to the state or local health authorities.

We raise this point because Dr. Ward's instructions seem to have clouded the real issue as expressed in the above quote, regarding Respondent's compliance with the Standards, and to a certain extent mitigates the violation of section 3.127(c). See pp 9-12, Respondent's brief.

2. Water Receptacles.

Respondent, on or about June 25, 1981, August 17, 1981, September 29, 1981 and November 30, 1981, was in violation of section 3.130 of the standards (9 CFR 3.130) in that the water receptacles were not kept clean and sanitary at respondent's facility.

On four inspections of the Corinth facility, both bathtubs containing drinking water were found to be dirty with algae growth. On the last three inspections, these findings were confirmed by photographs taken by Mr. Wooldridge (Cx. 9, 15, 16, 21).

Both Respondent and his employee testified that twice a day they ran a hose in each tub for about 30 minutes and let it overflow. In addition, Respondent's employee occasionally mops the tubs as far as he can through the bars. However, Dr. Ward testified that this was not sufficient to eliminate the algae on the bottom of the tubs, the dark green slime on the bottom and sides. This condition existed in both the metal cage and the chain link cage, although no complaint is made with respect to the condition of two small metal receptacles mounted on the wall of the metal cage.

Section 3.130 of the standards requires all water receptacles to be clean and sanitary. Respondent's receptacles were not clean and sanitary.

This violation of the standards as well as the drainage violation continues through the inspections in 1982 (Rx 4 and 5).

3. Premises.

Respondent, on or about June 25, 1981, August 17, 1981, September 29, 1981 and November 30, 1981, was in violation of section 3.131(c) of the standards (9 CFR 3.131(c)) in that the premises were not kept clean at respondent's facility.

On his June 25, 1981 inspection of respondent's facility in Corinth, Dr. Ward found excessive weeds, grass, and generally ill-maintained grounds surrounding respondent's cages. He explained that the weeds aided in the breeding of insects. On his inspections of August 17, September 29, and November 30, 1981, he similarly found that the grass and weeds needed cutting and the grounds needed cleaning.

ing. These conditions were confirmed by photos taken by Mr. Woodlridge on the last three inspections.

As noted earlier construction work on a perimeter fence caused much disruption of the grounds. While this may be a mitigating factor with regard to some of the conditions found on August 17, 1981, it is not a complete excuse. There is no evidence in the record that any construction was underway at the time of the earlier June 25, 1981 inspection. Furthermore, photos taken at the time of the September 29, 1981 inspection, indicate that construction of the fence had been completed, but the weeds grew abundantly (Cx. 12, 14, 17).

4. Pest Control.

Respondent, on or about June 25, 1981, August 17, 1981, September 29, 1981 and November 30, 1981, was in violation of section 3.131(d) of the standards (9 CFR 3.131(d)) in that a safe and effective program for the control of pests was not established and maintained at respondent's facility.

At the time of the June 25, 1981 inspection Dr. Ward knew of no plan of Respondent for pest control and found evidence of infestation by rats, mice, and insects. On the inspections of August 17, September 29, and November 30, 1981, he found no improvement in pest control and specifically noted mosquito larvae growing on September 29, 1981 (Cx. 3) and rat holes on November 30, 1981 (Cx. 4). Mr. Woodlridge's photo of November 30, 1981 shows the rodent holes (Tr. 90, Cx 24).

Both the pest and the premises problems were rectified according to reports of inspections made in April and June 1982 (Tr. 50-52, Rx 4 and 5).

5. Sunlight.

Complainant alleges that Respondent was in violation of section 3.127(a) of the standards on the four inspections conducted in 1981, because there was insufficient shade from sunlight provided for the bears located at Respondent's outdoor facility.

Dr. Ward inspected respondent's facility on June 25, 1981, and determined that there was insufficient shade for the bears. He stated that on that date the roof of each cage only extended to the sides of the cage. Therefore, except when the sun was almost directly overhead, it would shine in from the side and fill the cage. Dr. Ward has lived all his life in Mississippi and is familiar with the Corinth area. He testified that in the summer it is often 95° to 100° in that area. Therefore, it was essential to have shade for the bears. He again inspected the Facility on August 17, 1981, September 29, 1981 and November 30, 1981 and found no significant improvement.

At one point, prior to the September 29 inspection (Cx 3). Respondent had extended the roof out approximately 3 to 4 feet on the west side of both cages. However, this was still inadequate in Dr. Ward's opinion.

He stated that since there was no downward tilt to the overhang, the sun would still shine on the bears by 2 or 3 p.m.

Both sides argue persuasively in their briefs (Complainant's main Brief pp 11-13, and Reply Brief pp 3-4, Respondent's Brief pp 4-8) from the record testimony and photographs taken of Respondent's facilities about the presence and absence of sunshine and shadows in the bear cages. The arguments concern the dimensions of the cages, the location of Respondent's novelty shop with reference to shadows cast on the cages, adequacy of the dens contained in the cages, and so on.

The problem here however is that Complainant's witnesses have never viewed the cages when the floors were completely covered by sunshine. Tr. 61-62, 91, 98, 177-179. The inspections of the premises were made around 10:30 or 11:00 a.m., and not between 2:00 and 4:00 p.m.

Further, Dr. Ward's reports of June 1982 (Rx 4) indicates that protection from the sun was adequate.

In this posture, we must conclude that there is insufficient evidence to support Complainant's allegation concerning insufficient shade.

SANCTION

Complainant seeks a cease and desist order and a civil penalty of \$300.

In the light of the findings of fact and conclusions herein, only the proposed cease and desist will be ordered.

There were four continuing violations during the period of the four inspections in 1981, with two continuing into 1982 (drainage and water containers). These violations support the inclusion of a cease and desist order herein. Likewise, the form of the cease and desist as proposed by Complainant is adequate and is supported by the authorities cited at pages 7 and 8 of Complainant's reply brief.

We withhold imposition of a fine because Respondent has displayed "good faith" in certain instances. As summarized at page 18 of Respondent's brief:

"When Dr. Ward suggested that Respondent erect an 8 foot perimeter fence, Respondent built that fence (Tr. 114). When Dr. Ward suggested that awnings be put on Respondent's bear

cages, Respondent put those awnings up (Tr. 112-113). As soon as he could get the fence that had been requested erected, Respondent cleaned up his premises in response to Dr. Ward's complaint about them (Tr. 50-51). Although Respondent's solution to his grass cutting problem may appear a bit unorthodox, the goats he put inside the perimeter fence have alleviated the problem (Tr. 67). On June 2, 1982 the shade provided Respondent's bears was also found to be in compliance (Tr. 48). Further, on April 14, 1982 and June 2, 1982, the inspectors found pest control to be adequate (Tr. 51, 53)."

Further there was mitigating evidence offered to show that on one occasion, August 17, 1981, violations of two of the standards, drainage and unclean grounds, were aggravated as a result of the perimeter fence construction.

ORDER

Respondent, his agents and employees, directly or indirectly, through any corporate or other device, in connection with his business as an exhibitor under the Act, shall cease and desist from failing to comply with the requirements of the Act and the standards, including, but not limited to, those concerning outdoor facilities, watering, and sanitation.

Copies of this decision and order shall be served upon the parties.

This order shall become final and effective thirty-five days after service of this order upon Respondent unless there is an appeal to the Judicial Officer, filed pursuant to section 1.145 of the Rules of Practice (7 CFR 1.145). [This decision and order became final June 2, 1983.-Ed.]

(No. 22,537)

In re: IOLA M. WAIT, d/b/a WAIT'S KENNELS. AWA Docket No. 229.
Decided June 2, 1983.

Civil penalty—Consent

Respondent consented to the issuance of this decision and order in which they are assessed a civil penalty of \$500.

Robert A. Ertman, for complainant.

Russell D. Roberts, Kirksville, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 C.F.R. 1.138).

Respondent admits the jurisdictional allegations of the complaint specifically admits that the Secretary of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, and waives hearing and further procedure here. Complainant and respondent consent to the issuance of this order.

ORDER

A civil penalty of \$500 is assessed against respondent, which shall be paid by a certified check or money order payable to the order of the Treasurer of the United States and forwarded to Robert Ertman, Attorney, Marketing Division, Office of the General Counsel, Room 2014-S, U.S. Department of Agriculture, Washington, D.C. 20250, within 30 days of the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

(No. 22,538)

In re: RANDY and MARY BERHOW. AWA Docket No. 220. Decided June 9, 1983.

Facilities—Primary enclosures—Feeding—Watering—Sanitation

Respondents were ordered to cease and desist from failing to comply with the requirements of the Act and regulations and standards issued thereunder concerning facilities, primary enclosures, feeding, watering and sanitation relating to the operation of dog kennels. Respondents were assessed a civil penalty of \$750 and their license as a dealer under the Act was suspended for a period of 60 days and thereafter until in full compliance with the Act and the regulations and standards issued thereunder.

Gregory Cooper, for complainant.

Respondent, *pro se*

William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§2131-2155), in which Administrative Law Judge William J. Weber filed a Default Decision and Order on April 18, 1983, ordering respondents to cease and desist from various practices, assessing a civil penalty of \$750, and suspending respondents' license as a dealer for 60 days, and thereafter until respondents are in full compliance with the Act and regulations.

On May 20, 1983, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§556 and 557 (7 C.F.R. §2.35).¹ The case was referred to the Judicial Officer for decision on June 8, 1983.

Based upon a careful consideration of the record, Judge Weber's decision is adopted as the final decision, with additional conclusions by the Judicial Officer following Judge Weber's conclusions. The final order is identical to Judge Weber's order, except that the effective date has been changed in view of the appeal.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a proceeding under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), hereinafter referred to as the Act, and the regulations and standards issued pursuant to the Act (9 CFR Part 3). The Administrator, Animal and Plant Health Inspection Service, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 CFR, Part 1, Subpart H) and section 19 of the Act (7 U.S.C. 2149), initiated this proceeding with a complaint filed on November 19, 1982. Copies of the complaint and the applicable Rules of Practice were duly served by the Hearing Clerk by certified mail on respondents on November 24, 1982, in accord with said Rules of Practice (7 CFR 1.147(b)). No answer was filed by the respondents and the respondents were so notified in a letter by the Hearing Clerk sent on December 30, 1982.

¹ The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

No answer or other communication has been received from the respondents.

Respondents' failure to file an answer within the time specified in the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing (7 CFR 1.136(c), 1.139). Therefore, this Decision and Order is entered according to the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. (a) Randy and Mary Berhow, hereinafter referred to as the respondents, are partners doing business as M&R Kennels, whose address is R.R. 1, Box 77, Cylinder, Iowa 50528.

(b) Respondents are now, and at all times material herein were, engaged in business as a licensed dealer within the meaning of sections 2 and 3 of the Act (7 U.S.C. 2132 and 2133), raising, buying and selling dogs in commerce.

(c) Respondents, from June 2, 1981, until July 28, 1981, operated licensed dealer facilities both at the above address and at 1601 South Broadway, Emmetsburg, Iowa 50536.

(d) Respondents, from June 3, 1982, until the present time, have operated licensed dealer facilities only at the above address in Cylinder, Iowa.

(e) Respondents, at the time of licensing, were advised of the requirements of the Act and the regulations and standards issued thereunder, and agreed to comply with said requirements.

2. (a) On or about June 2, 1981, June 9, 1981, and July 28, 1981, respondents were in violation of section 3.1(d) of the standards (9 CFR 3.1(d)) in that respondents failed to remove and dispose of excessive excreta under the dog runs in the kennel building at the Emmetsburg location.

(b) On or about June 2, 1981, June 9, 1981, July 28, 1981, and June 3, 1982, respondents were in violation of section 3.2(d) of the standards (9 CFR 3.2(d)) as follows:

(i) On all four dates, the interior surfaces in the whelping (puppy) building at the Cylinder location were not constructed or maintained so that they were substantially impervious to moisture and might be readily sanitized.

(ii) On June 2, 1981, June 9, 1981, and July 28, 1981, the interior surfaces in the wholesale building at the Cylinder location were not constructed and maintained so that they were substantially impervious to moisture and might be readily sanitized.

(iii) On June 2, 1981, June 9, 1981, and July 28, 1981, the interior surfaces in the kennel building at the Emmetsburg location were

not constructed and maintained so that they were substantially impervious to moisture and might be readily sanitized.

(iv) On June 3, 1982, the interior surfaces in the adult dog building at the Cylinder location were not constructed and maintained so that they were substantially impervious to moisture and might be readily sanitized.

(c) On or about June 3, 1982, respondents were in violation of section 3.4(a)(1)(i) of the standards (9 CFR 3.4(a)(1)(i)) in that the primary enclosures in the adult dog building at the Cylinder location had several wire ends protruding into said enclosures and thus were not maintained in good repair to protect the dogs from injury.

(d) On or about July 28, 1981, respondents were in violation of section 3.4(b)(1) of the standards (9 CFR 3.4(b)(1)) in that, to provide them shelter from rain, eight dogs normally kept outside were placed in a primary enclosure in the wholesale building at the Cylinder location which did not have sufficient space to allow each dog to turn about freely and to easily stand, sit and lie in a comfortable normal position.

(e) On or about July 28, 1981, and June 3, 1982, respondents were in violation of section 3.4(b)(2) of the standards (9 CFR 3.4(b)(2)) as follows:

(i) On July 28, 1981, respondents housed four dogs needing a minimum of 30.25 sq. ft. of space in a primary enclosure in the wholesale building at the Cylinder location which contained approximately 20 sq. ft. of space.

(ii) On June 3, 1982, respondents housed two dogs needing a minimum of 35.64 sq. ft. of space in a primary enclosure in the adult dog building at the Cylinder location which contained approximately 20 sq. ft. of space.

(f) On or about June 2, 1981, and June 3, 1982, respondents were in violation of section 3.5(b) of the standards (9 CFR 3.5(b)) in that the food receptacles in all locations were rusty and not kept clean.

(g) On or about June 2, 1981, and June 3, 1982, respondents were in violation of section 3.6 of the standards (9 CFR 3.6) in that the water receptacles in all locations were rusty and not kept clean.

(h) On or about June 2, 1981, and June 3, 1982, respondents were in violation of sections 3.7(a) and (b) of the standards (9 CFR 3.7(a) and (b)) in that the primary enclosures in the kennel building at the Emmetsburg location on June 2, 1981, and in the adult dog building at the Cylinder location on June 3, 1982, contained excessive excreta which contaminated the dogs and had not been sanitized often enough to prevent an accumulation of excreta.

(i) On or about June 2, 1981, June 9, 1981, and July 28, 1981, respondents were in violation of section 3.7(c) of the standards (9 CFR 3.7(c)) in that there were accumulations of trash outside the kennel building at the Emmetsburg location.

CONCLUSIONS

By reason of the findings of fact set forth herein, respondents have violated sections 3.1(d), 3.2(d), 3.4(a)(1)(i), 3.4(b)(1), 3.4(b)(2), 3.5(b), 3.6, 3.7(a) and (b), and 3.7(c) of the regulations and standards (9 CFR 3.1(d), 3.2(d), 3.4(a)(1)(i), 3.4(b)(1), 3.4(b)(2), 3.5(b), 3.6, 3.7(a) and (b), and 3.7(c)).

These violations warrant the sanctions authorized under the Act (7 U.S.C. 2149(a) and (b)) and contained in the following order.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' appeal does no more than challenge the accuracy of some of the findings of fact, all of which are deemed admitted by respondents' failure to file an answer. 7 C.F.R. §1.136(c). Accordingly, there is no basis for respondents' appeal.

ORDER

Respondents, their agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from failing to comply with the requirements of the Act and the regulations and standards thereunder including, but not limited to, the standards under the Act concerning facilities, primary enclosures, feeding, watering, and sanitation.

Respondents are assessed a total civil penalty of \$750 for which the respondents are jointly and severally liable and which shall be paid by certified check or money order to the order of the Treasurer of the United States and which shall be forwarded to Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250, within 30 days from service of this Order on respondents.

Respondents' license as a dealer under the Act is hereby suspended for a period of 60 days and thereafter until in full compliance with the requirements of the Act and the regulations and standards issued thereunder.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on respondents. The suspension period shall begin on the 30th day after such service.

(No. 22,539)

In re: THE OHIO STATE UNIVERSITY. AWA Docket No. 186. Decided June 15, 1983.)

Veterinary care—Civil penalty—Consent

Respondent consented to the issuance of this decision and order in which they were ordered to cease and desist from failing to comply with any requirements of the Act and the regulations and standards issued thereunder including the standard concerning veterinary care. Respondent was assessed a civil penalty of \$500.

Gregory Cooper, for complainant.

Robert L. Holder, Columbus, Ohio, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act (7 U.S.C./2131 *et seq.*), hereinafter referred to as the Act, and the regulations and standards issued pursuant to the Act. It was instituted by a complaint filed on December 20, 1981, by the Administrator, Animal and Plant Health Inspection Service, pursuant to the Act and the applicable Rules of Practice (7 CFR 1.133(b)(1)). This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

The respondent specifically admits the jurisdictional allegations of the complaints, but neither admits or denies the remaining allegations of the complaint. The respondent waives the right to a hearing and any further procedures in this matter. The parties consent to the issuance of this decision for the purpose of settling this proceeding.

FINDINGS OF FACT

1. The Ohio State University, hereinafter referred to as the respondent, is a state university whose address is 190 North Oval Drive, Columbus, Ohio 43210.

2. Respondent is now, at all times material herein was, a registered research facility within the meaning of sections 2 and 6 of the Act (7 U.S.C. 2132 and 2136).

3. Respondent, at the time of registration, was advised of the requirements of the Act and the regulations and standards issued thereunder, and agreed to comply with said requirements.

CONCLUSIONS

Inasmuch as the respondent has admitted the jurisdictional allegations of the complaint and the parties have agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order will be issued.

ORDER

Respondent, its agents and employees, directly, through any corporate or other device, shall cease and desist from failing to comply with any of the requirements of the Act and the regulations and standards issued thereunder, including, but not limited to, the standard concerning veterinary care.

Respondent is assessed the sum of \$500 which shall be paid by certified check or money order made to the order of the Treasurer of the United States and which shall be forwarded to Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250, within 30 days from the date that this Order becomes effective.

This decision shall have the same force and effect as a decision entered after a full hearing and shall be effective upon service on the respondent.

(No. 22,540)

In re. RICHARD HIX and EILEEN M. MORRISON, d/b/a BELL COUNTY ZOO, and CITY OF LUFKIN, TEXAS d/b/a ELLEN TROUT ZOO. AWA Docket No. 187. Decided May 19, 1983.

Handling of animals—Complaint dismissed

Because no violation of the Act, regulations or standards was shown, the complaint was dismissed with prejudice as to the remaining respondent Richard Hix.

Donald Tracy, for complainant.

Stephen L. Blythe, Temple, Texas, for respondent Hix.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This cause arises by reason of a Complaint having been filed December 29, 1981, charging the above-named Respondents with having violated the Animal Welfare Act (7 U.S.C. 2131, *et seq.*), and the Regulations issued thereunder. Respondent Hix is the only re-

maining Respondent; Ms. Morron passed away June 6, 1982, and the Complaint was dismissed as to her; on July 16, 1982, the City of Lufkin, d/b/a Ellen Trout Zoo consented to an order being issued against it.

The oral hearing herein took place on August 18, 1982, before Administrative Law Judge Dorothea A. Baker, in Austin, Texas. Complainant was represented by Donald A. Tracy, Esquire, Office of the General Counsel, United States Department of Agriculture. Respondent Hix was represented by Stephen E. Blythe, Esquire, P.O. Box 911, Temple, Texas. At the oral hearing, paragraph 10 of the Complaint was dismissed. (Tr. 12). In due course, the parties filed briefs, the last brief having been filed November 16, 1982.

FINDINGS OF FACT

1. Mr. Richard Hix, sometimes referred to as Respondent, is an individual whose mailing address is Route 4, Box 4384T, Belton, Texas 76513.

2. Ms. Eileen Morron, now deceased, was an individual, who, together with Respondent Hix, were the co-owners of the Bell County Zoo in Belton, Texas, and at one time was a named Respondent. At the oral hearing the Complainant dismissed all charges against Respondent Morron. Respondent Hix is the sole surviving owner of Bell County Zoo in Belton, Texas.

3. Also named as a Respondent in the Complaint filed was the City of Lufkin, Texas, d/b/a Ellen Trout Zoo. On July 16, 1982, a Consent Order was issued as to said Respondent City of Lufkin, Texas, d/b/a Ellen Trout Zoo.

4. At all times pertinent herein all Respondents, including Respondent Hix, were licensed under the Act as Class C exhibitors.

5. On July 8, 1981, Respondent Hix and Ms. Morron traveled to the Ellen Trout Zoo to pick up several animals, including a male and female Sooty Mangebey, a species of African monkey, in payment for a sable antelope. Respondent Hix and Ms. Morron were not aware, in advance, as to the specific type and number of animals that would be picked up in payment for the antelope.

6. Respondent Hix took with him to Ellen Trout Zoo a variety of size and style of crates to be used for carrying and transporting animals of various types, nature, and size.

7. Thus, when Respondent Hix and Ms. Morron arrived at the Ellen Trout Zoo they had approximately 18 to 20 different size crates with them because they were not sure of what type or size of animals were to be received in trade for the antelope and, therefore, they did not know in advance what type and size crates were necessary.

8. Although Respondent Hix was present and observed the capture, crating, and subsequent handling of the monkeys, he did not participate therein. The chasing of the monkeys, before and during their capture, under the circumstances of the heat and humidity, by personnel of the Ellen Trout Zoo, was a substantial contributing factor to their injuries and subsequent death. Tr. 97. The temperament of such monkeys was described as excitable and skittish. (Tr. 45, 47, 85)

9. The decision as to the type and size of the crate to be used for each of the eight animals loaded was left solely to the officials of the Ellen Trout Zoo.

10. The monkeys were placed in crates by the employees of the Ellen Trout Zoo which crates were large enough to insure that each animal had sufficient space to turn about freely in a stance where both feet and hands were on the floor, and further, the crates were large enough to insure that each animal could sit in an upright position.

11. After being chased and crated, the monkeys were then placed on the ground outside with the temperature nearly 90 degrees, where they remained for at least thirty minutes, while employees of the Ellen Trout Zoo captured and loaded the remaining animals. After all animals were crated and loaded, the monkeys were then placed onto an open trailer where they remained approximately 30 more minutes while the Director of Ellen Trout Zoo took Respondent Hix and Ms. Morron into his office for the purpose of filling out United States Department of Agriculture forms required in such a transfer of animals. During such interval, Respondent Hix drove the trailer into a shady area so that the animals would have the comfort of the shade.

12. Respondent Hix signed the official transfer forms, and, at such time he was not aware that the Sooty Mangabey monkeys were suffering any ailment.

13. One of the monkeys died while still in the crate and the other died the next day after medical efforts to save it were unsuccessful.

14. The monkeys that died were the first of eight animals captured and loaded.

15. With respect to the type and size of crate used in the attempted transfer of the Sooty Mangabey monkeys, Respondent Hix and Ms. Morron had recently received this particular crate in a shipment of primates from the Catoctin Mountain Zoo in Thurmont, Maryland. That shipment of primates had come through two separate airlines by air freight before its arrival at the Bell County Zoo in Belton, Texas. By the fact that this crate had been used by a li-

censed primate dealer, and further by the fact that this crate had passed through two different airlines and the necessary inspections at each airlines, Respondent Hix had every reason to believe that such crate was of proper size and type and contained the proper ventilation for the transfer of the two monkeys in question. Further, Respondent Hix and Ms. Morron upon their arrival at the Ellen Trout Zoo relied solely on the knowledge and experience of the zoo officials in the selection of the particular crates to be used in the handling of each respective animal.

16. Respondent Hix and Ms. Morron never left the premises of the Ellen Trout Zoo with the Sooty Mangebey monkeys, and, therefore, never transported the deceased monkeys.

17. There were three other monkeys involved in the transfer. These three monkeys were among the second group of animals captured and crated. Their capture was far less difficult than the capture of the two deceased monkeys. These three monkeys were then placed in a crate identical in size, shape, and ventilation characteristics, to the crate that was used for the handling of the Sooty Mangebey monkeys. These three monkeys arrived at the Bell County Zoo in Belton, Texas, in good health. The difference in the two situations is simply the manner in which the Sooty Mangebey monkeys had been chased and captured.

18. Due to the heat and humidity at the time, the manner in which they were chased, captured, together with their excitable nature, the damage to the deceased monkeys had already been done by the time they were loaded into the crate and did not occur after they were inside the crate. The evidence indicates that it is likely that the heat stroke would have occurred regardless of what type, size, shape, ventilation characteristics, etc. of the crate in which they were placed.

19. The persuasive evidence of record shows that Respondent Hix did not do anything improper or in violation of the Act in either the selection of the animals, the capture of the animals, or the loading of the animals onto the trailer.

20. The weight of the evidence of record does not show that Respondent Hix violated the Animal Welfare Act or the Regulations issued thereunder.

CONCLUSION

The Government contends that the two Sooty Mangabey monkeys here involved died as a result of being mishandled in violation of the Animal Welfare Act and the Regulations issued thereunder, by personnel of the Ellen Trout Zoo and Richard Hix of the Bell County

Zoo. The Ellen Trout Zoo consented to a Decision and Order which was issued July 16, 1982,

Section 3.91(b) of the standards requires that non-human primates be handled so as not to cause physical or emotional trauma to the animal. Complainant maintains that even if Respondent Hix did not participate in the events leading up to the death of the monkeys, "These monkeys were being captured and handled *for him*". (Emphasis added). Complainant would impose an obligation on Respondent Hix that he did not legally have, namely, to have left the monkeys there. At what point he was supposed to have left them is not stated—such as when they were being chased, when they were first crated, or after they were in the crate.

Complainant acknowledges that, "We do not feel that his violation in this case was necessarily motivated by a lack of concern for his animals". Rather, Complainant asserts, "* * * that he is insufficiently attentive to the responsibilities of an exhibitor." The weight of the persuasive evidence of record shows that Respondent Hix was not inattentive to the responsibilities of a licensed exhibitor, and that he and Ms. Morron noticed the condition of the monkeys long before anyone else, and they alone made the immediate life saving efforts.

No violation of the Animal Welfare Act, regulations, or standards has been shown. Accordingly, the following Order shall issue.

ORDER

The Complaint herein is dismissed with prejudice.

All requests, motions, and arguments of the parties have been considered. To the extent they have not been ruled upon and are inconsistent with this decision, they are denied.

This Decision and Order shall become final 35 days after service thereof upon the parties, unless appealed within 30 days to the Department's Judicial Officer as provided in the Rules of Practice and Procedure, 7 C.F.R. 1.130, et seq.

Copies hereof shall be served upon the parties.

[This decision and order became final June 27, 1983.—Ed.]

(No. 22,541)

In re: STATE UNIVERSITY OF NEW YORK. AWA Docket No. 204. Decided June 30, 1983.

Primary enclosures—Consent

Respondent consented to the entry of this decision and order in which they were ordered to provide that all primary enclosures used in its research premises to house rabbits will have sufficient space for the rabbits to make normal postural adjustments with adequate movement and to comply with every other provision of the Animal Welfare Act.

Morris L. Selinger, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act as amended (7 U.S.C. 2131 *et seq.*) by a complaint filed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent has violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (7 CFR 1.138).

The respondent, admits the jurisdictional allegations of the complaint, specifically admits that the Secretary has jurisdiction in this matter, and consents and agrees for the purpose of settling this proceeding to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent, The State University of New York, is a branch of the State of New York, whose address is Room 415 South, University Plaza, Albany, New York 12246.

2. At all times material herein the Downstate Medical Center, hereinafter referred to as "respondent's research premises" was and is a branch of the State University of New York, and its address is Downstate Medical College, 450 Clarkson Avenue, Brooklyn, New York 11203.

3. At all times material herein, respondent was registered under the Act as a research facility.

4. At the time respondent's registration number 21-136 was issued, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, subchapter A of the Code of Federal Regulations.

5. Between 1978 and 1981, respondent's research premises on various occasions were inspected by USDA personnel, who determined that the primary enclosures used to house rabbits were in violation of the Act and the regulations promulgated thereunder.

CONCLUSIONS

The respondent having admitted the jurisdictional facts alleged in the complaint and the parties having agreed to the entry of this decision without further procedure, such decision will be entered.

ORDER

Respondent, its agents and employees directly or indirectly through any corporate or other device in connection with its business under the Act shall:

1. Provide that all of the primary enclosures used in its research premises to house rabbits are constructed and maintained in such manner to provide sufficient space for the rabbits to make normal postural adjustments with adequate movement; and

2. Comply with each and every other provision of the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*).

This Order shall have the same force and effect as if entered pursuant to a full hearing and shall be final upon issuance and effective upon service of the decision upon respondent.

(No. 22,542)

In re: ELSIE MOUNTRAY. AWA Docket No. 240. Decided June 30, 1983.

Civil penalty—License suspension—Consent

Respondent consented to the issuance of this decision and order in which she was assessed a civil penalty of \$100, her license was suspended for 14 days and she was ordered to cease and desist from violating the Act, regulations and standards.

Robert A. Ertman, for complainant.

Respondent, *pro se*.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, as amended. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction

in this matter, neither admits nor denies the remaining allegations of the complaint, and waives hearing and further procedure herein. Complainant and respondent consent to the issuance of this order.

ORDER

A civil penalty of \$100 is assessed against respondent, which shall be paid by a certified check or money order payable to the order of the Treasurer of the United States and forwarded to Robert A. Ertman, Attorney, Marketing Division, Office of the General Counsel, Room 2014-S, U.S. Department of Agriculture, Washington, D.C. 20250, within 30 days of the effective date of this order. Further, respondent's license is suspended for a period of 14 days, from May 17 to May 30, 1983, inclusive, and provided, that if it should subsequently be determined in a proceeding before the Secretary that respondent violated the period of suspension, then respondent's license shall be suspended for a period of 60 days. Further, respondent is ordered to cease and desist from violating the Animal Welfare Act, as amended, and the regulations and standards issued pursuant to the Act. This order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

(No. 22,543)

In re: DIXIE M. BONTRAGER. AWA Docket No. 248. Decided June 30, 1983.

Civil penalty—Consent

Respondent consented to the issuance of this decision and order in which respondent was assessed a civil penalty of \$250 and was ordered to cease and desist from violating the Act, regulations and standards.

Robert A. Ertman, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, as amended. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rule of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

Respondent admits the jurisdictional allegations of the complaint specifically admits that the Secretary of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, and waives hearing and further procedure hereof. Complainant and respondent consent to the issuance of this order.

ORDER

A civil penalty of \$250 is assessed against respondent, which shall be paid by a certified check or money order payable to the order of the Treasurer of the United States and forwarded to Robert A. Ertman, Attorney, Marketing Division, Office of the General Counsel, Room 2014-S, U.S. Department of Agriculture, Washington, D.C. 20250, within 30 days of the effective date of this order. Further, respondent is ordered to cease and desist from violating the Animal Welfare Act, as amended, and the regulations and standards issued pursuant to the Act. This order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

COURT DECISION

In re: MOUNTAINSIDE BUTTER & EGG COMPANY *v.* U.S. DEPARTMENT OF AGRICULTURE. Civil Action No. 80-3898. (USDA I&G Docket No. 64) Decided June 23, 1982.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Clarkson S. Fisher, Chief Judge.

OPINION AND ORDER

Mountainside Butter & Egg Company (Mountainside) seeks judicial review of a final agency action by the Judicial Officer of the United States Department of Agriculture (USDA) pursuant to section 701 *et seq.* of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* Mountainside also moves to expand the record below. USDA cross moves for summary judgment. For the reasons stated herein, the Government's motion for summary judgment is granted.

Mountainside operates an egg-products processing plant subject to the terms and provisions of the Egg Products Inspection Act, 21 U.S.C. §§1031-1056 (the Act), and the regulations thereunder, 7 C.F.R. §2859. The statutory criteria of the Act require the Secretary of Agriculture to "cause continuous inspection to be made" of egg-processing plants "for the purpose of preventing the entry into or flow or movement in commerce of, or the burdening of commerce by, any egg product which is . . . misbranded or adulterated." 21 U.S.C. §1034(a). The Secretary has the authority to retain or segregate eggs and egg products as he deems necessary, 21 U.S.C. §1034(b), to condemn or destroy adulterated eggs or egg products, 21 U.S.C. §1034(c), or to refuse inspection of any plant which fails "to meet the requirements of this section." 21 U.S.C. §1035(b). Unless the eggs and egg products are inspected, their sale and transportation in commerce is prohibited. 21 U.S.C. §1037(b). Persons violating section 1037 may be prosecuted pursuant to 21 U.S.C. §1041. Thus, an administrative action denying an egg processor inspection services prevents that processor from marketing its eggs or egg products.

Mountainside processes eggs by breaking their shells and then pasteurizing and cooling the contents, which is sold in thirty-pound cans to bakeries and other commercial outlets. The fresh eggs which it processes are normally not of a quality suitable for sale in their shells. Typically, plaintiff purchases eggs of the type defined in the Act as "restricted eggs," being "checks" with cracked or broken

shells or "dirty eggs" with dirt or other foreign material adhered to the shells. 21 U.S.C. §1033.

Mountainside accomplished the breaking of shell eggs for processing by two methods—automatic egg-breaking machines or hand-breaking stations. At the hand-breaking stations employees would use knives to break the shells over trays into which the contents would be dropped and from whence it flowed into metal buckets. Because of the nature and source of the egg stock commonly used by Mountainside, it is most important that all steps in the process be conducted with care to avoid the possibility of harmful adulteration.

The major functions in an egg-processing plant may be described as inspection, regulation, cleansing, breaking, pasteurization and packaging. The nature of product and the functions involved in its processing afford ample opportunity for the contamination prohibited by the Act.

On January 3, 1977, USDA filed an administrative complaint alleging that Mountainside had violated various regulations relating to the processing of egg products. Subsequent to the filing of the complaint, Mountainside and USDA entered into a stipulation, on January 7, 1977, leading to the issuance of a consent order, under the terms of which inspection services were to be withdrawn from Mountainside for twelve months if, within one year from January 14, 1977, it failed to comply with any provisions of the order or committed substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 C.F.R. §5960(f)(1). Thereafter, USDA moved to impose sanctions pursuant to the consent order, charging Mountainside with commission of various violations during the period of February through May 1977.

There were two extensive evidentiary hearings in which the administrative law judge (ALJ) produced a lengthy record of eleven volumes. The ALJ heard the testimony of four different inspectors, assessed their credibility and ultimately determined that in fact Mountainside had committed substantial violations of the regulations and had violated the consent decree. Accordingly, he withdrew inspection services for twelve months.

The issue in this case is whether or not the ALJ's findings were supported by substantial evidence. Substantial evidence is something less than the weight of the evidence; the possibility of drawing two inconsistent conclusions from the evidence does not render the evidence insubstantial. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 620 (1966). It is enough that the evidence adduced before an agency is such as a reasonable mind might accept as ade-

quate to support the conclusion under review. *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 477 (1951); *National Council, etc. v. Subversive Activities Cont. Bd.*, 322 F.2d 375, 388 (D.C. Cir. 1963). The Supreme Court reiterated this when it stated,

we have consistently expressed the view that ordinarily review of an administrative decision is to be confined to "consideration of the decision of the agency . . . and of the evidence on which it was based." . . . "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." . . .

FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) (citations omitted).

The record indicates that Mountainside repeatedly and consistently engaged in at least three types of regulatory violations which affect the quality of egg products and cause a hazard to public health.

First, inspectors observed repeated failure to control the segregation of shell egg breaking stock entering the breaking room in violation of 7 C.F.R. §2859. USDA inspectors testified that they observed 883 instances of dirty-looking or moldy shell eggs entering the breaking room on conveyor lines. The percent of ineligible eggs entering the breaking room on conveyor lines was in excess of 20 percent in 16 instances, 11 to 20 percent in 45 instances, 6 to 10 percent in 318 instances, and 1 to 5 percent in 504 instances. I am satisfied that those percentages are substantial.

The second type of violation was Mountainside's failure to denature inedible eggs with a distinctively colored dye to prevent the blending of inedible eggs and edible eggs and egg products as required by 7 C.F.R. §2859.504(e). The record demonstrates that there was clear, convincing evidence that Mountainside had repeatedly failed to properly denature its inedible eggs and egg products. Inspectors observed 103 instances when inedible eggs contained insufficient amounts of dye in violation of the applicable regulations.

Mountainside's third type of violation was its failure to re-examine egg liquid for wholesomeness before emptying it from the smaller holding tank into the large general tank, as required by 7 C.F.R. §2859.22(f). Evidence was presented at the administrative hearing that, on at least 27 different occasions, inspectors noted that Mountainside permitted egg products to be pumped directly into the holding tank without first being collected for re-examination.

Mountainside argues that the finding of substantial violations was unsupported by the evidence and attempts to bolster this argument by demonstrating that there was never a single instance during entire period alleged in the complaint that salmonella bacteria had been reported from laboratory testing. Furthermore, Mountainside contends that the record does not contain any evidence to indicate that it had sold any of the eggs that had been improperly denatured.

The essential purpose of the Act is to protect consumers from adulterated eggs. See 21 U.S.C. §1032, *et seq.* In section 1033(a) the Act specifies that the term "adulterated" is applicable to any egg or egg product

...

(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for human food;

(4) if it has been prepared, packaged, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have become injurious to health.

21 U.S.C. §1033(a)(3) & (4).

By definition then, pasteurization of an egg product, even though the process destroys harmful bacteria such as salmonella, does not preclude the product from being found to be adulterated. The presence of filth or the product's preparation under unsanitary conditions renders an egg product adulterated within the meaning of the Act. *United States v. 1,200 cans, Pasteurized Whole Eggs, Etc.*, 339 F. Supp. 131 (N.D. Ga. 1972); see also, *United States v. Wiesenfield Warehouse Co.*, 376 U.S. 86 (1964).

Mountainside asserts that the enforcement of regulations against it was selective, biased and unfair and, therefore, Mountainside is being denied equal protection of the law as guaranteed under the fifth amendment.

As I stated above, four different inspectors testified and each recounted the same pattern of violations. The ALJ found their testimony to be more reliable than that given in Mountainside's behalf. He also found that each inspector conducted inspections at Mountainside's plant in a fair and reasonable manner consistent with inspections conducted at all other official plants. Therefore, there is no basis for a finding of denial of equal protection.

I find unsupported the argument of Mountainside that Judge Palmer improperly considered prior violations in this determination of substantial violations warranting withdrawal of service for one year. The findings were supported adequately by the evidence presented by the four inspectors of violations which occurred during

the one-year period as set out in the consent order. I have reviewed the record and I find it complete. There is nothing in the record to indicate that the ALJ acted erroneously or without justification.

The granting of the motion for summary judgment is dispositive of the motion to expand the record. An order accompanies this opinion. No costs.

ORDER

For the reasons set forth in the court's opinion filed this date, it is on this 23rd day of June, 1982,

ORDERED that the motion of the Government for summary judgment is granted. No costs.

MISCELLANEOUS ORDERS

(No. 22,544)

In re: G. B. ARCHER. HPA Docket No. 112. Order issued May 31, 1983.

Alexandra Maravel, for complainant.
Respondent, *pro se*.

Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER

Upon motion of the Complainant to withdraw the complaint, it is hereby ordered that the motion is granted and that this action is terminated.

(No. 22,545)

In re: RODNEY W. DICK and EARNEST P. KNIPP. HPA Docket No. 179. Order issued June 28, 1983.

Robert A. Ertman, for complainant.
Raymond Overstreet, Liberty, Kentucky, for respondent.
John G. Liebert, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING MOTION FOR
RELIEF FROM STIPULATION AND
CONSENT DECISION

On June 7, 1983, respondent Rodney W. Dick filed a motion to be relieved from the stipulation and consent decision previously filed in this proceeding on June 23, 1982. The prior order entered by consent assessed a civil penalty against respondent Dick in the amount of \$300, and provided:

Furthermore, respondent is disqualified for a period of 3 years, commencing on June 1, 1982, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction.

Respondent Dick contends that he was a minor at the time of the alleged violation, and that although the agreement for a consent de-

cision was signed by his father, who was represented by an attorney, the "attorney represented that this only prohibited Rodney W. Dick Respondent from showing his own horses."

Respondent's motion for relief is denied since it is not authorized under the Department's rules of practice. Under the rules of practice, 35 days after an initial decision is filed by an Administrative Law Judge, it becomes final, unless there is an appeal to the Judicial Officer. 7 C.F.R. §1.142(c). It is settled that the Judicial Officer has no jurisdiction to hear an appeal that is filed after it has become final. *In re Petro*, 42 Agric. Dec. ____ (May 9, 1983); *In re Brink*, 41 Agric. Dec. 2146 (1982) (order dismissing appeal), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Mass., Inc.*, 38 Agric. Dec. 379 (1978) (order denying late appeal); *In re Cook*, Agric. Dec. 116 (1978) (order dismissing appeal).

Respondent cannot, by labeling his document a motion for relief or for reconsideration, obtain greater rights to review an initial decision than he would have by filing an appeal.

But even if the motion could be considered, it would be denied on the merits. The order is plain and unambiguous. There is no reasonable basis even for one acting without an attorney to believe that the order prevents respondent only from showing his own horses. A unilateral mistake as to the legal effect of a settlement order is not a ground for permitting a party to withdraw from a settlement agreement. See *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 799-800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D. N.J. June 23, 1982), *appeal docketed*, No. 82-5788 (3d Cir. Dec. 21, 1982); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1823-30 (1976), *aff'd sub nom Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977). Cf. *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order will not be set aside merely because respondent misunderstood the nature of the order that would be issued).

For the foregoing reasons, respondent's motion is denied.

(No. 22,546)

In re: RICHARD TODD. HPA Docket No. 139. Order issued June 29, 1983.

Alexandra Marvel, for complainant.

Respondent, *pro se*

Order issued by William J. Weber, Administrative Law Judge.

ORDER

Upon motion of the Complainant to withdraw the complaint, it is hereby ordered that the motion is granted and that this action is terminated.

DISCIPLINARY DECISIONS

(No. 22,547)

In re: SHAMROCK MEATS, INC. and FRED STEIN. P&S Docket No. 6102. Decided May 4, 1983.

Packer—Altering hot weight of livestock carcasses—Civil penalty—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from misrepresentating actual hot weight of livestock carcasses sold on a weight basis, selling livestock carcasses on the basis of inaccurate hot weights, and issuing documents showing other than true and correct hot weights of livestock carcasses. Respondent Shamrock was assessed a civil penalty of \$4,000.

Joanne Schwartz, for complainant.

Alvin F. Howard, Los Angeles, California, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION (CONSENT)

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*), by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR §1.138).

The respondents admit the jurisdictional allegations in paragraph I and II of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure and consent and agree, for purposes of settling this proceeding and for such purpose only, to the entry to this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Shamrock Meats, Inc., hereinafter referred to as respondent Shamrock, is a corporation organized and existing under the laws of the State of California with its principal place of business located in Los Angeles, California. Its mailing address is 3461 East Vernon Avenue, Los Angeles, California 90058.

2. Respondent Shamrock is and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Fred Stein, hereinafter referred to as respondent Stein, individual whose business mailing address is 3461 East Vernon Avenue, Los Angeles, California 90058.

4. Respondent Stein is and at all times material herein was:

(a) Secretary, Treasurer and part Owner of respondent Shamrock;

(b) Responsible, in combination with others, for the management, direction and control of respondent Shamrock; and

(c) A packer within the meaning of and subject to the provisions of the act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Shamrock Meats, Inc., its directors, officers, employees, agents, successors and assigns, and respondent Stein, individually or as an officer, director, agent or employee of respondent Shamrock, directly or indirectly, through any contract or other device, shall cease and desist from:

1. Altering or misrepresenting the actual hot weight of livestock carcasses sold on a weight basis;

2. Selling or offering to sell livestock carcasses on the basis of altered or inaccurate hot weights; and

3. Issuing or causing to be issued trip sheets and other documents showing hot weights other than the true and correct weights of the livestock carcasses.

In accordance with section 203(b) of the Act (7 U.S.C. §1823(b)), respondent Shamrock is assessed a civil penalty in the amount of \$4,000.00 (Four Thousand Dollars).

The provisions of this Order shall become effective on the day after this decision is served on the respondent. The Packers and Stockyards Administration agrees, by entry of this Order, that no further action shall be taken by the Packers and Stockyards Administration with respect to the transactions alleged in the Complaint. Copies of this decision will be served upon the parties.

(No. 22,548)

In re: WILBUR HAUSCHILDT. P&S Docket No. 6058. Decided May 5, 1983.

Dealer—Bonding—Insufficient funds checks—Failure to pay—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from engaging in business in any capacity for which bonding is required under the act without filing and maintaining a reasonable bond, issuing insufficient funds checks, failing to pay when due and failing to pay the full purchase price of livestock. Respondent was suspended as a registrant for 4 months and thereafter until he complies fully with the bonding requirements under the Act and regulations.

Barbara Harris, for complainant.

Michael G. Shepherd, West Des Moines, Iowa, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyard Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Wilbur Hauschildt, also d/b/a H&W Cattle Co., hereinafter referred to as respondent, is an individual whose mailing address is P.O. Box 191, Ida Grove, Iowa 51445.

(2) Respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) Engaged in the business of buying livestock on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, directly or indirectly, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in commerce in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for four (4) months and thereafter until he complies fully with the bonding requirements under the Act and regulations. When respondent demonstrates that he is in full compliance with such requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the four month period.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,549)

In re: L. KENNETH TROUTT and ROMA J. TROUTT. P&S Docket No. 6034. Decided May 9, 1983.

Dealer—Market Agency—Insolvency—Misuse of shippers proceeds—Custodial account—Employees purchasing out of consignments—Suspension of registrants—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business while insolvent, misusing shippers proceeds, failing to deposit into and properly maintain their custodial account for shippers proceeds and permitting employees to purchase livestock out of consignments for any purpose. Respondents were suspended as registrants until they demonstrate that they are no longer insolvent.

Peter Train, for complainant.

Stanley W. Welsh, Boise, Idaho, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondents does not meet the requirements of the Act and that respondents have wilfully violated the Act and the regulations issued thereunder (9 C.F.R. 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 C.F.R. 1.138).

The respondents admit the jurisdictional allegations of paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree for the purpose of settling this proceeding and such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondents L. Kenneth Troutt and Roma J. Troutt, doing business as Boise Valley Livestock Commission Co. and O.K. Livestock Markets and Feed Yards, hereinafter referred to as respondents, are partners whose business mailing address is P.O. Box 218, Caldwell, Idaho 83605.

2. Respondents were at all times material herein:

(a) Engaged in the business of conducting and operating the Boise Valley Livestock Commission Co. and O.K. Livestock Markets and Feed Yards stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency buying and selling livestock in commerce on a commission basis, and as a dealer buying and selling livestock in commerce on their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents L. Kenneth Troutt and Roma J. Troutt, individually or in combination with each other or with other persons, directly through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, *i.e.*, while their current liabilities exceed their current assets;
2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own and for purposes other than the payment of lawful marketing charges and the remittance of net proceeds to shippers, or making such other use of shippers' proceeds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and payment of the portions thereof due to the person or persons entitled thereto;
3. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;
4. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. 201.42); and
5. Permitting ringmen or other employees performing duties of comparable responsibility in connection with the actual conduct of auction sales by the market agency to purchase livestock out of consignment for speculative resale or for any other purpose.

The respondents are suspended as registrants under the Act until they demonstrate that they are no longer insolvent and that the deficit in their custodial account for shippers' proceeds has been eliminated. When respondents demonstrate that they are no longer insolvent and that they no longer have a deficit in their custodial

account for shippers' proceeds, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this Order shall be effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,550)

In re: MIGUEL A. MACHADO and G.L. "BUD" COZZI. P&S Docket No. 5943. Decided May 9, 1983.

Order of dismissal vacated—Remanded for preparation of decision and order—*In camera* examination of investigation report

The Judicial Officer vacated the order filed December 30, 1982 which dismissed the complaint in this proceeding because complainant refused to comply with the Administrative Law Judge's rulings that it make an investigation report available for *in camera* examination. The proceeding was remanded to the Administrative Law Judge for the preparation of an initial decision and order based on the evidence in the record and ordered that no inference is to be drawn that complainant's investigation report contains materials which would exculpate respondent.

Victor W. Palmer, Administrative Law Judge.

Thomas C. Heinz, for complainant.

Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REMAND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*). On December 30, 1982, Administrative Law Judge Victor W. Palmer filed an initial decision dismissing the complaint because complainant refused to comply with his rulings that it make an investigative report available for *in camera* examination.

After a careful review of the record and the applicable case law, I have concluded that Judge Palmer erred in dismissing the complaint and in inferring that the investigative report contains materials which would exculpate respondent. Accordingly, the proceeding should be remanded for the preparation of an initial decision by Judge Palmer based on the evidence in this case, free from the inference which he drew because of the failure of complainant to file the investigative report.

In order to expedite the proceeding, the case is being remanded at this time, with the Judicial Officer's decision to follow later.

ORDER

The order filed December 30, 1982, dismissing the complaint in this proceeding is hereby vacated and the proceeding is remanded to the Administrative Law Judge for the preparation of an initial decision based on the evidence in the record and any reasonable inferences drawn from the record. No inference is to be drawn that complainant's investigative report contains materials which would exculpate respondent.

Immediately after the initial decision is filed in this case, complainant shall transmit a copy of the investigative report to Judge Palmer, who shall review it *in camera* as soon as practicable, and make a determination as to what parts of the investigative report, if any, he believes should have been turned over to respondent. Judge Palmer's determination, in this respect, shall not be served on respondent. It shall be sealed with the investigative report and delivered to the Hearing Clerk. It shall be available for review only by the Judicial Officer and any reviewing court.

The investigative report shall be hand carried within the Department, and when it is in the custody of the Hearing Clerk, it shall be kept in a secured location apart from the file in the case. It shall be returned to complainant when the litigation in this proceeding is ultimately concluded.

(No. 22,551)

In re: PERCY QUINN STOCKYARDS, INC. and PERCY QUINN CATTLE Co., INC. P&S Docket No. 6103. Decided May 18, 1983.

Dealer—Market Agency—Insolvency—Insufficient funds checks—Failing to pay for livestock—Suspension of registration—Consent

Respondent consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business while insolvent, issuing insufficient funds checks, failing to pay when due, and failing to pay for livestock. Respondents were suspended as registrants under the Act for 45 days and thereafter until they demonstrate that they are no longer insolvent.

Barbara Harris, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents' financial condition does not meet the requirements of the Act and that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR §1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Percy Quinn Stockyards, Inc., hereinafter referred to as Quinn Stockyards, is a Mississippi corporation with its principal place of business located at Jackson, Mississippi. Its business mailing address is P.O. Box 4508, Jackson, Mississippi 39216.

2. Quinn Stockyards, at all times material herein, was registered with the Secretary of Agriculture as a market agency to provide clearing services for Percy Quinn Cattle Co., Inc.

3. Percy Quinn Cattle Co., Inc., hereinafter referred to as Quinn Cattle Co., is a Mississippi corporation with its principal place of business located at Jackson, Mississippi. Its business mailing address is P.O. Box 4508, Jackson, Mississippi 39216.

4. Quinn Cattle Co., at all times material herein, was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

5. Respondent Quinn Stockyards and respondent Quinn Cattle Co. are related corporations which are commonly owned, directed, managed and controlled by John Anderson Quinn, Virgil Berry Quinn and Sybil B. Quinn.

6. Respondent Quinn Stockyards and respondent Quinn Cattle Co., in combination with each other and under common direction, management and control, were at all times material herein engaged in the business of a dealer buying and selling livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Percy Quinn Stockyards, Inc., and respondent Percy Quinn Cattle Co., Inc., their officers, directors, agents, and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, i.e., while their current liabilities exceed their current assets;
2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented for payment;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

The respondents are suspended as registrants under the Act for a period of forty five (45) days and thereafter until they demonstrate that they are no longer insolvent. When respondents demonstrate that they are no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the forty five (45) day period.

The provisions of this Order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,552)

In re: NEAL JESTER. P&S Docket No. 6075. Decided May 19, 1983.

Dealer—Bonding requirement—Suspension—Civil penalty—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from engaging in business in any capacity for which bonding is required under the Act without filing and maintaining a reasonable bond or its equivalent. Respondent was suspended as a registrant under the Act until he complies fully with the bonding requirements and was assessed a civil penalty of \$500.

Jory M. Hochberg, for complainant.
Respondent, *pro se*.

Decided by John G. Liebert, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Neal Jester, hereinafter referred to as the respondent, is an individual whose mailing address is Route 6, Box 1120, Benton, Arkansas 72015.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Neal Jester, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in busi-

ness in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such requirements, a supplemental order will be issued in this proceeding, terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. §213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies hereof shall be served on the parties.

(No. 22,553)

In re: PARKHURST FARMS, INC., L. DARLENE PARKHURST and WILLIAM R. PACKHURST. P&S Docket No. 6118. Decided May 20, 1983.

Dealer—Market agency—Insolvency—Insufficient funds checks—Failing to pay when due—Suspension—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business while insolvent, issuing insufficient funds checks in payment for livestock, and failing to pay, when due, for livestock. The corporate respondent was suspended as a registrant under the Act for 42 days and thereafter until it demonstrates that it is no longer insolvent. The individual respondents were ordered to not engage in business as a dealer or market agency for 42 days.

Peter V. Train, for complainant.
Respondent, *pro se*.

Decided by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. §181 *et seq.*), by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act and that the respondents wilfully violated the Act. This decision is:

entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR §1.138).

The respondents admit the jurisdictional allegations in paragraph I and II of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Parkhurst Farms, Inc., hereinafter referred to as the corporate respondent, is a corporation whose business mailing address is P.O. Box D, Vale, Oregon 97918.

2. The corporate respondent at all times material was:

(a) Engaged in the business of conducting and operating the Eastern Oregon Livestock Auction stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce.

3. L. Darlene Parkhurst and her husband, William R. Parkhurst, hereinafter referred to as the individual respondents, are individuals whose business mailing address is P.O. Box D, Vale, Oregon 97918.

4. The individual respondents are, and at all times material herein were:

(a) Owners of all of the corporate stock issued by the corporate respondent;

(b) The officers of the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, and the individual respondents, individually or as officers, directors, agents or employee of the corporate respondent or its successors, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, *i.e.*, while current liabilities exceed current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented; and

3. Failing to pay, when due, the full purchase price of livestock.

The corporate respondent is suspended as a registrant under the Act for a period of 42 days and thereafter until it demonstrates that it is no longer insolvent. When the corporate respondent demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 42 day period.

The individual respondents shall not engage in business as a dealer or market agency for a period of 42 days after the effective date of this order.

The provisions of the Order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,554)

In re: DANNY RUBELL. P&S Docket No. 6054. Decided June 2, 1983.

Dealer—Market agency—Misrepresenting purchase weights, prices and buying charges—Issuing documents showing false weights or prices—Collecting payment based on false weights or prices—Inserting or failing to insert in documents any information resulting in a false record of purchase or sale—Suspension

Respondent was ordered to cease and desist from misrepresenting to purchasers the original purchase weights or prices of livestock or the true nature of charges made for his buying services, preparing and issuing accounts of purchase or invoices showing false weight or price entries for livestock, collecting payment from purchasers of livestock on the basis of false weight or price entries on accounts of purchase or invoices, and inserting or failing to insert in accounts of purchase or in-

voices any information where such insertion or omission results in a false or misleading record of a livestock sale or purchase transaction. Respondent was ordered to keep accounts and records which fully and correctly disclose the true facts of all transactions subject to the Act. Respondent was suspended as a registrant under the Act for 21 days

Joanne Schwartz, for complainant.

Richard A. Koehler, Geneva, Nebraska, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*).¹ An initial Decision and Order upon Admission of Facts by Reason of Default was issued on January 24, 1983, by Administrative Law Judge Dorothea A. Baker ordering respondent to cease and desist from specified practices, requiring respondent to maintain adequate accounts and records, and suspending respondent as a registrant for 21 days.

On February 17, 1983, respondent requested that the proceeding be reopened. Before that request was denied by Judge Baker on May 5, 1983, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§556 and 557 (7 C.F.R. §2.35).²

Based upon a careful consideration of the record, the initial Decision and Order filed January 24, 1983, is adopted as the final Decision and Order in this case, except that the effective date of the order has been changed in view of the appeal. Additional conclusions by the Judicial Officer follow Judge Baker's conclusions.

¹ See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and May 1982 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

² The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of a prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION
PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 192, *et seq.*), hereinafter referred to as the Act, instituted by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the Respondent has wilfully violated the Act and the regulations thereunder (9 C.F.R. §201.1 *et seq.*).

Copies of the Complaint and the Rules of Practice (7 C.F.R. §1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to do so would constitute an admission of all the material allegations contained in the Complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by respondent's failure to answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to §1.139 of the Rules of Practice (7 C.F.R. §1.139).

The Complaint herein was filed on August 19, 1982, and served upon the Respondent on August 23, 1982. By letter dated September 15, 1982, the Respondent was advised that an Answer had not been received. On November 30, 1982, the Complainant filed a "Motion for Adoption of Proposed Decision", which was served upon the Respondent on December 7, 1982. No timely response was received from the Respondent, but, on January 6, 1983, a letter was filed objecting to the proposed suspension if the Livestock Auction Market was subject thereto. Pursuant to the Order therefor, the Complainant, on January 21, 1983, filed "Complainant's Response to Respondent's Objection to the Default Order". Premised upon the pleadings herein it is clear that the Respondent is in default, and that the objections which he has made to the proposed Default Decision are without merit. Accordingly, the proposed decision herein shall be issued.

FINDINGS OF FACT

1. (a) Danny Rubel, hereinafter referred to as the respondent, is an individual doing business as Rubel Hog & Cattle Co.,

Stanton Livestock Auction Market, with his principal place of business at Stanton Livestock Auction Market, Thorn St., Stanton, Iowa 51573.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Stanton Livestock Auction Market stockyard, a stockyard posted under and subject to the provisions of the Act;

(2) Engaged in the business of buying and selling livestock in commerce for his own account and buying and selling livestock in commerce on a commission basis; and

(3) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock in commerce for his own account, and as a market agency, buying and selling livestock on a commission basis in commerce.

2. Respondent, in connection with his business activities subject to the Act, wilfully engaged in unfair and deceptive acts and practices in that, on or about the dates and in the transactions set forth in paragraph II of the complaint, respondent purchased hogs at his Stanton Livestock Auction Market facility and resold such hogs to R&S Livestock, Afton, Iowa, at a price purportedly based on respondent's actual purchase weights. In fact, respondent prepared sales invoices which showed increased weights as his actual purchase weights. These false and incorrect purchase weights were obtained by adding an arbitrary number of pounds to the true purchase weights. Respondent billed and collected from R&S Livestock on the basis of these false and incorrect weights.

3. Respondent, in connection with his operations subject to the Act, failed to keep and maintain accounts and records which fully and correctly disclosed the true nature of the transactions involved in his business, in that respondent failed to keep and maintain (1) scale tickets; (2) purchase invoices; and (3) sales invoices.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated section 312(a) of the Act (7 U.S.C. §213(a)), and section 201.55 of the regulations (9 C.F.R. §201.55).

By reason of the facts found in Finding of Fact 3 herein, the respondent has violated section 401 of the Act (7 U.S.C. §221).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent argues on appeal that he does business in two separate capacities, Rubel Hog & Cattle Company, and Stanton Live-

stock Auction Market; that the violations alleged in the complaint relate solely to his Rubel Hog & Cattle Company business, which does only two to four percent of the business of his auction market, and that, therefore, the suspension order should not apply to his auction market business.

However, it is the settled practice under the Act to suspend a registrant in all capacities in which he is registered. For example, in *In re Roseth*, 39 Agric. Dec. 28, 37 (1980), *aff'd per curiam*, No. 80-1156 (8th Cir. Oct. 1, 1980), it is stated:

Respondent Burton argues that the suspension order should not apply to his business as a livestock dealer, but the Act authorizes the suspension of a "registrant" for a reasonable specified period. Mr. Burton is a registrant who is registered in two capacities—as a market agency and as a dealer. It has been the consistent practice under the Act to suspend a registrant in all capacities in which he is registered. *See, e.g., In re W.I. Bowman*, 23 Agr Dec 1074, 1089 affirmed *sub nom. Bowman v. United States Department of Agriculture*, 363 F.2d 81 (C.A. 5).

The fact that a suspension order affects a portion of a respondent's business that was not involved in the violations is considered in determining the length of the suspension period. *In re Esposito*, 38 Agric. Dec. 613, 633 (1979); *In re Sol Salins, Inc.*, 37 Agric Dec. 1699, 1735 (1978); *In re Livestock Marketers, Inc.*, 35 Agric Dec. 1552, 1563-64 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1850 (1975); *In re Speight*, 33 Agric. Dec. 280, 317-18 (1974). For example, in *Livestock Marketers, supra*, it is stated (35 Agric. Dec. at 1564):

In the present case, under the Department's settled sanction policy, the suspension period would be substantially greater than 30 days except for the fact that the order applies to both corporations, which handle a very large volume of livestock, and the order also affects the auction market activity of respondent Livestock Marketers, even though the false weighing was done by Livestock Marketers only in its dealer capacity.

In the present case, the suspension period would have been much longer than 21 days if it did not affect respondent's large auction market business, which was not involved in the violations. For example, false weights from pencil changes were involved in *Fairbank v. Hardin*, 429 F.2d 264 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), in which a 6 month's suspension order was issued. A ta

ble listing the suspension periods imposed for false weighing or causing false weighing of livestock from 1950 to January 1974 is set forth in *In re Worsley*, 33 Agric. Dec. 1547, 1584-92 (1974). The table is summarized in the decision in that case. The maximum suspension was five years, the average 245 days and the median 90 days. *Id.* 1575-76.

The modest 21-day suspension order in this case can only be justified by the fact that respondent's large auction market business, which was not involved in the violations, is affected by the suspension order.

Respondent also seeks to reopen this proceeding to have the opportunity to present mitigating circumstances at a hearing. Respondent contends that when he failed to file an answer, he was acting without an attorney and did not understand fully the consequences and scope of a suspension order. Respondent's present counsel contends that respondent was misled—albeit an intention to mislead might not have existed as regards counsel for complainant—as to how and in what manner respondent's status as a registrant would be affected by a suspension order.

Complainant's counsel categorically denies respondent's claims, in this respect, and asserts that respondent was fully advised as to the effect of a suspension order and respondent's duty to file an answer.

The record supports complainant's position. The complaint and the letter from the Assistant Hearing Clerk serving the complaint both advised respondent that failure to file an answer to the complaint within 20 days would constitute an admission of the allegations in the complaint.³ The Assistant Hearing Clerk's letter also advised respondent that failure to request a hearing during the time allowed for filing an answer would "constitute a waiver on your part, of oral hearing."⁴

In a letter to the Assistant Hearing Clerk dated January 3, 1982, respondent admitted that he told complainant's counsel during settlement negotiations that he would agree to a 21-day suspension order if it did not apply to Stanton Livestock Auction Market. This strongly indicates that respondent clearly understood the type of order complainant was seeking in the consent negotiations, and that a consent settlement was not reached because respondent was not willing to agree to a 21-day suspension order applicable to the Stanton Livestock Auction Market as well as the Rubel Hog & Cattle Company.

³ See 7 C.F.R. §1.136(c).

⁴ See 7 C.F.R. §§1.139,.141(a).

In the circumstances, there was no excuse for respondent's failure to file an answer and request a hearing, and there is no basis for setting aside the default order in this case. See *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980). Application of the default provisions of the Rules of Practice does not deprive respondent of his rights under the Due Process Clause of the Fifth Amendment to the Constitution. See *United States v. Hulings*, 484 F. Supp. 562, 568 (D. Kan. 1980).

For the foregoing reasons, the order proposed by Judge Baker should be issued.

ORDER

The respondent, his agents and employees, individually or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Misrepresenting to the purchasers of livestock the original purchase weights or the original purchase prices of livestock or the true nature of the actual charges made for his buying services;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate or misleading weight or price entries for such livestock;

3. Collecting payment from the purchases of livestock on the basis of false, inaccurate or misleading weight or price entries on accounts of purchase, invoices or billings; and

4. Inserting or failing to insert in accounts of purchase, invoices, billings, or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose the true facts of all transactions involved in his business subject to the Act including scale tickets, purchase invoices, and sales invoices documenting respondent's purchase and sale of livestock.

Respondent is suspended as a registrant under the Act for a period of 21 days.

The cease and desist and record keeping provisions of this order shall become effective on the day after service of this order. The suspension provisions of this order shall become effective on the 30th day after service of this order; *Provided*, however, that if by

any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

(No. 22,555)

In re: RAY FOX. P&S Docket No. 6056. Decided June 2, 1983.

Dealer—Bonding requirement—Insufficient funds checks—Failure to pay when due—Ordered not to engage in business—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from engaging in business in any capacity for which bonding is required under the Act without filing or maintaining a reasonable bond or its equivalent, issuing insufficient funds checks or drafts in payment for livestock, and failing to pay, when due, for livestock. Respondent was also ordered not to engage in business as a dealer or market agency nor serve as an agent or employee of a dealer or market agency for a period of five years.

Jory Hochberg, for complainant.

James E. Bell, Oklahoma City, Oklahoma, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents

and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ray Fox, d/b/a Fox Cattle Company, hereinafter referred to as the respondent, is an individual whose business mailing address is Route One, Caney, Oklahoma 74533.

2. The respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) A dealer, buying and selling livestock in commerce for his own account, within the meaning of and subject to the provisions of the Act.

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Fox, has agents, employees and representatives, directly or indirectly, or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and regulations;

2. Issuing checks or drafts in purported payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks or drafts are drawn to pay such checks or drafts when presented; and

3. Failing to pay, when due, for livestock purchased.

Respondent shall not engage in business as a dealer or market agency within the meaning of the Packers and Stockyards Act, nor serve as an agent or employee of a dealer or market agency, for a period of five years from the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies hereof shall be served on the parties.

(No. 22,556)

In re: LARRY J. BROWN. P&S Docket No. 6061. Decided June 2, 1983.

Dealer—Market agency—Bonding requirement—Suspension of registration—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from engaging in business in any capacity for which bonding is required under the Act and regulations without filing and maintaining a reasonable bond or its equivalent. Respondent was suspended as a registrant under the Act until he complies with the bonding requirements.

Jory Hochberg, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Larry J. Brown, hereinafter referred to as the respondent, is an individual whose mailing address is P.O. Box 227, Centerville, Georgia 31093.

2. Respondent is and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Larry J. Brown, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations promulgated thereunder, without filing and maintaining a reasonable bond or its equivalent.

Respondent is suspended as a registrant under the Act until such time as he is in full compliance with the bonding requirements of the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies hereof shall be served upon the parties.

(No. 22,557)

In re: STOCKYARD INDUSTRIES, INC. and JOHN TREADWELL. P&S Docket No. 6088. Decided June 2, 1983.

Market agency—Dealer—Insolvency—Custodial account—Insufficient funds checks—Remittance of net proceeds—Misuse of proceeds from sale of livestock—Suspension—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business while insolvent, failing to deposit the required amounts into and otherwise maintain their custodial account for shipper's proceeds in conformity with the regulations, issuing insufficient funds checks in payment of the net proceeds due from the sale of consigned livestock, failing to remit net proceeds to consignors when due, using proceeds from the sale of livestock for purposes other than the payment of lawful marketing charges and remittance of net proceeds to consignors. The corporate respondent was suspended as registrant for 21 days and thereafter until it demonstrates that it is no longer insolvent and that the deficit in its custodial account for shipper's proceeds has been

eliminated. The individual respondent was suspended as a registrant under the Act for 24 months.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act, and that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Stockyard Industries, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located at Highway 81, Comanche, Oklahoma, and whose mailing address is P.O. Box 189 A Wellston, Oklahoma 74881.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of conducting and operating the Stockyard Industries, Inc. stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in business as a market agency selling livestock on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis.

3. John T. Treadwell, hereinafter referred to as the individual respondent, is an individual whose address is Suite 300, 2828 Northwest 57th Street, Oklahoma City, Oklahoma 73112.

4. At all times material herein, the individual respondent was the vice president and co-owner of the corporate respondent and man-

aged, directed and controlled the business activities of the corporate respondent, and was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its successors, officers, directors, agents and employees, and the individual respondent, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in the business of a market agency while insolvent; i.e., while current liabilities exceed current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42(c) of the regulations (9 C.F.R. §201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. §201.42);

4. Issuing checks in payment of the net proceeds due from the sale of consigned livestock without having sufficient funds available in the account upon which such checks were drawn to pay such checks when presented;

5. Failing to remit to consignors of livestock, when due, the net proceeds due from the sale of their livestock; and

6. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes other than the payment of lawful marketing charges and remittance of net proceeds to consignors.

The corporate respondent is suspended as a registrant under the Act for a period of 21 days and thereafter until such time as it demonstrates that it is no longer insolvent and that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated. When corporate respondent demonstrates that it is no longer insolvent and that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the 21 day period.

The individual respondent, John Treadwell, is suspended as a registrant under the Act for a period of 24 months.

The provisions of this Order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

Addendum: The Administrative Law Judge has signed the Consent Decision, which was presented to her and which was signed on behalf of the Corporate Respondent, and the Complainant. However, it is noted that the individual Respondent, John Treadwell, has not consented thereto in his individual capacity, although a sanction is imposed upon him.

(No. 22,558)

In re: INTERNATIONAL CATTLE COMPANY, SOUTHERN LIVESTOCK, INC., MIKE TOMKOW, JR., CECIL M. YATES, SR., D. L. CRUMM, C. W. BAILEY, and ERNIE L. KENNEDY. P&S Docket No. 6076. Decided April 26, 1983.

Dealer—Market agency—Insolvency—Insufficient funds checks—Failing to pay when due—Failing to pay—Suspension of registration—Default

Respondent International Cattle Company was ordered to cease and desist from engaging in business while insolvent, issuing insufficient funds checks in payment for livestock, failing to pay, when due, and failing to pay the full purchase price of livestock. Respondent International Cattle Company was suspended as a registrant under the Act for 2 years and thereafter until it demonstrates that it is no longer insolvent.

Barbara Harris, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO
RESPONDENT INTERNATIONAL CATTLE COMPANY UPON
ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *int seq.*), hereinafter referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that Respondent International Cattle Company's financial condition does not

meet the requirements of the act and that the respondents have willfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. §1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent International Cattle Company has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, as they pertain to respondent International Cattle Company, which are admitted by respondent International Cattle Company's failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

FINDINGS OF FACT

1. International Cattle Company, hereinafter referred to as respondent ICC, is a corporation whose principal place of business is located in Plant City, Florida, and which operates at the facilities owned and formerly used by respondent Southern. Its business address is Route 1, Box 60, Oxford, Florida 32684.

2. Respondent ICC was, at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to purchase livestock in commerce on a commission basis.

3. (a) As of April 30, 1981, respondent ICC's current liabilities exceeded its current assets. As of said date, respondent ICC had current liabilities totalling \$1,345,916.97 and current assets totalling \$898,339.53, resulting in an excess of current liabilities over current assets of \$447,577.44.

(b) As of November 30, 1981, respondent ICC's current liabilities exceeded its current assets. As of said date, respondent ICC had current liabilities totalling \$2,861,015.30 and current assets totalling \$811,849.05, resulting in an excess of current liabilities over current assets of \$2,549,166.25.

(c) Respondent ICC's current liabilities presently exceed its current assets.

4. Respondent ICC, during the period of April 30, 1981, through November 30, 1981, engaged in the business of buying and selling livestock in commerce, notwithstanding the fact that during such period, respondent ICC's current liabilities exceeded its current assets.

5. Respondent ICC, in connection with its operations as a dealer and market agency, on or about the dates and in the transactions set forth in paragraph IV of the complaint and on divers other dates, purchased livestock and in purported payment therefor, issued checks or drafts which were returned unpaid by the bank upon which they were drawn because respondent ICC did not have sufficient funds available in the account upon which such checks or drafts were drawn to pay such checks or drafts.

6. Respondent ICC, in connection with its operations as a dealer and market agency, on or about the dates and in the transactions set forth in paragraphs IV and V of the complaint and on divers other dates, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

7. As of November 30, 1981, there remained unpaid by respondent ICC a total of approximately \$2,173,878.91 for the livestock purchases set forth in paragraphs IV and V of the complaint.

CONCLUSIONS

By reason of the facts found in Finding of Fact 3 herein, respondent ICC's financial condition does not meet the requirements of the Act (7 U.S.C. §204).

By reason of the facts found in Finding of Fact 4 herein, respondent ICC has wilfully violated section 312(a) of the Act (7 U.S.C. §213(a)).

By reason of the facts found in Findings of Fact 5, 6 and 7 herein, respondent ICC has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§213(a), 228b).

ORDER

Respondent ICC, its officers, directors, agents, employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while its current liabilities exceed its current assets;

2. Issuing checks or drafts in payment for livestock purchases without having and maintaining sufficient funds available in the

bank account from which such checks or drafts are drawn to pay such checks or drafts when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent ICC is suspended as a registrant under the Act for a period of two (2) years and thereafter until it demonstrates that it is no longer insolvent. When respondent ICC demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the two year period.

This Order shall be effective from the sixth day after the Decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §1.180 *et seq.*).

[This decision and order became final June 6, 1983.—Ed.]

(No. 22,559)

In re: CARRINGTON LIVESTOCK SALES, INC. P&S Docket No. 6045.
Decided June 20, 1983.

Dealer—Market agency—Custodial account—Insufficient funds checks—Failing to remit net proceeds when due—Accounts and records—Suspension—Consent

Respondent consented to the entry of this decision and order in which it was ordered to cease and desist from failing to make timely deposits into and properly maintain its custodial account for shippers' proceeds, issuing insufficient funds checks in payment for livestock, and failing to remit, when due, net proceeds from the sale of livestock to consignors. Respondent was ordered to keep and maintain accounts and records which fully and correctly disclose all transactions involved in its business. Respondent was suspended as a registrant until it demonstrates it is no longer insolvent and the deficit in its custodial account has been eliminated.

Barbara Harris, for complainant.

Wm. B. Deas, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent's financial condition does not meet the requirements of the Act, and that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carrington Livestock Sales, Inc., hereinafter referred to as respondent, is a North Dakota corporation with its principal place of business located at Carrington, North Dakota and whose business mailing address is Carrington, North Dakota 58421.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Carrington Livestock Sales, Inc. stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of buying and selling livestock in commerce for its own account; and

(d) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its officers, directors, agents, employees, successors and assigns, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to deposit in its "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. §201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain its "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. §201.42);

3. Issuing checks to consignors in payment of the net proceeds resulting from the sale of their livestock on a commission basis without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

4. Failing to remit, when due, to consignors the net proceeds resulting from the sale of consigned livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in its business, including: (a) monthly reconciliations of its bank accounts; (b) monthly postings to its general ledger; (c) monthly listings of its accounts receivables; (d) monthly inventory records for its livestock and feed; (e) a dealer purchase and sales journal; (f) a separate and detailed account of the purchase and sale of livestock in support of the market; and (g) purchase and sales invoices (or accounts of sale) for dealer and market agency transactions.

Respondent is suspended as a registrant under the Act until it demonstrates that it is no longer insolvent and that the deficit in its custodial account has been eliminated. When respondent demonstrates that it is no longer insolvent and that the deficit in its custodial account has been eliminated, a supplemental order will be issued terminating the suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,560)

In re: M & G SLAUGHTER HOUSE, INC. P&S Docket No. 6122. Decided June 21, 1983.

Packer—Bonding requirement—Consent

Respondent consented to the entry of this decision and order in which it was ordered to cease and desist from purchasing livestock for slaughter without filing and maintaining a reasonable bond or its equivalent.

Peter V Train, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. M&G Slaughter House, Inc., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Edcouch, Texas. Respondent's mailing address is P.O. Box 247, Edcouch, Texas 78538.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

3. Respondent's average annual purchases of livestock exceed \$500,000.00.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent M&G Slaughter House, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any

corporate or other device, in connection with its operations as packer subject to the Act, shall cease and desist from purchasing livestock for slaughter without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The provisions of this Order shall become effective on the 1st day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,561)

In re: MIGUEL A. MACHADO and G. L. "BUD" COZZI. P&S Docket No. 5943. Decided June 24, 1983.

Order of dismissal vacated—Remanded for preparation of initial decision—Investigation report, *in camera* examination

The Judicial Officer vacated the Administrative Law Judge's order issued December 30, 1982 which dismissed the complaint because complainant refused to comply with the ruling to make an investigation report available for *in camera* examination. Discovery is not available under the Packers and Stockyards Act. The Department's policy is to protect the confidentiality of investigation reports to the maximum extent permitted by law.

Under the Jencks Act, the trial judge can only direct the Government to deliver material to the defendant; he cannot deliver it personally or dismiss the complaint if the Government refuses to comply. Respondent was attempting to engage in a general fishing expedition by demanding complainant's entire investigation report which is not authorized by the Jencks Act. Respondent failed to make a proper request for a Jencks Act "statement". A Jencks Act request may be denied if it comes too early or too late, but the request may be made during cross-examination. Legal reasoning, interpretations, opinions and analyses are not producible "statements" under the Jencks Act. A Jencks Act statement, to be producible, must relate to the witness' direct testimony, and can be used only during cross-examination for impeachment. However, respondent need not show that the Jencks Act statement and the witness' testimony are inconsistent, or that the statement is admissible in evidence. An *in camera* examination of a witness' statement is appropriate in doubtful cases, but not here, in view of respondent's attempt to engage in a general fishing expedition, etc.

The *Brady* doctrine, holding that it is a violation of due process for the Government to fail to turn over to the defendant in a criminal case exculpatory evidence, does not apply to administrative disciplinary proceedings. But assuming that it does apply, legal reasoning is not producible under the *Brady* doctrine. Also, material not producible under the Jencks Act is not producible under *Brady*, if it is of the type of material within the general orbit of the Jencks Act. Where there is a basis for believing that the Government possesses *Brady* material, an *in camera* examination is appropriate, but an *in camera* examination is not appropriate where the defendant makes a blanket request for favorable material and the Government denies that it has any exculpatory evidence.

Victor W. Palmer, Administrative Law Judge.

Thomas C. Heinz, for complainant.

Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND REMAND ORDER AS TO RESPONDENT COZZI

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*).¹ Respondent Machado, without admitting or denying the allegations of the complaint, consented to the entry of a decision and order suspending his registration for 30 days. Subsequently, an oral hearing was held with respect to respondent Cozzi (hereinafter sometimes "respondent").

On December 30, 1982, Administrative Law Judge Victor W. Palmer filed an initial decision dismissing the complaint against respondent because complainant refused to comply with his rulings that it make an investigation report available for *in camera* examination, pursuant to the Jencks Act or the *Brady* doctrine. Under Judge Palmer's rulings, he would have turned over to respondent any portions of the investigation report he determined to be producible, under the Jencks Act, the *Brady* doctrine, or Department policy, with complainant having no opportunity to elect not to comply with a production request, and to appeal, at the appropriate time, from his determination as to what material is producible.

¹ See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and May 1982 Supp.), at Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980)

On February 19, 1983, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§556 and 557 (7 C.F.R. §2.35).² The case was referred to the Judicial Officer for decision on April 11, 1983. For the reasons set forth below, I disagree with Judge Palmer's decision. An order remanding the case for further proceedings was filed on May 9, 1983, in advance of the present decision, in order to expedite the proceeding.

I. JENCKS ACT AND BRADY DOCTRINE.

The Department's Rules of Practice as to Jencks Act statements provide (7 C.F.R. §1.141(g)(1)(iii)):

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

The Jencks Act, referred to in the Department's Rules of Practice, provides (18 U.S.C. §3500):

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United

² The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness

and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however, taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

The Jencks Act was enacted as a result of the decision in *Jencks v. United States*, 353 U.S. 657, 665-69 (1957), in which the Court held that a defendant in a criminal proceeding had to be furnished with reports made to the FBI of defendant's activities by two Federal agents who testified as to such activities, so that the defendant could use the reports for impeachment purposes on cross-examination.

Since Congress has legislated in the field of procedure relating to the *Jencks* decision, the Jencks Act, "rather than the opinion of the Supreme Court in *Jencks*, measures the right to obtain statements or reports in the possession of the United States and the procedure to be used in obtaining them." *Foster v. United States*, 308 F.2d 751, 755 (8th Cir. 1962); and see *Palermo v. United States*, 360 U.S. 343, 350-51, 353 n. 11 (1959).

The *Brady* doctrine derives from *Brady v. Maryland*, 373 U.S. 83, 84-88 (1963), in which the Court held that a state violated the Due Process Clause of the Fourteenth Amendment when it failed to give the defendant in a criminal case a statement by another person admitting that he did the actual killing involved in the case in perpetration of a joint robbery. The Court held that it is a violation of due process to fail to furnish material to a defendant in a criminal case where it would tend to exculpate him or reduce the penalty, irrespective of the good faith or bad faith of the prosecution.

II. EVENTS LEADING TO DISMISSAL OF COMPLAINT

Insofar as relevant here, the complaint alleges:

During the period from March 9, 1979 to May 13, 1980 in the transactions set forth below and in divers other transactions, respondents in partnership with each other purchased livestock at various auction markets and consigned such livestock for sale at Turlock Livestock Auction, the auction market owned and operated by respondent Cozzi. Respondent Machado repurchased on a commission basis such livestock to fill orders held by respondent Machado. Respondents did not disclose their ownership of such livestock to respondent Machado's principals. Respondents shared equally the profits and losses from such transactions.

The complaint lists 10 specific instances in which respondents Machado and Cozzi were alleged to have made a secret profit of \$5,215.25 from transactions where they did not disclose their ownership of the livestock to respondent Machado's principals.

Complainant called three witnesses. Complainant's first witness, Wendell Cazier, an auditor for the Packers and Stockyards Administration, identified and explained the documents relating to the allegations of the complaint. He also testified as to the source of the documents.

The second witness, James Delfino, president and owner of Imperial Cattle Company, the principal for whom respondent Machado bought the livestock in question, testified that he paid respondent Machado a commission of \$2.00 per head, and expected Machado to purchase the livestock at the lowest price. Mr. Delfino testified that he did not know that respondent Machado had any financial interest in the livestock other than his commission, and that he would not have used Mr. Machado as his agent if he had known that Mr. Machado had a secret financial interest in the livestock.

Complainant's third witness, Terrence Archunde, a marketing specialist in the Marketing Practices Branch, Livestock Division, Packers and Stockyards Administration, Washington, D.C., testified as an expert witness for complainant. He testified that the practices involved violated the regulatory program, and explained the sanction requested by the agency and the reasons for the sanction.

Two witnesses testified for respondent, Russell Felch, one of respondent's employees at the Turlock Livestock Auction Yard, and respondent Cozzi, himself. They did not dispute that the transactions referred to in complainant's testimony occurred.

Respondent Cozzi testified that he purchased livestock through an agent, Miguel Machado, and that he and Mr. Machado shared the profits or losses on the livestock (Tr. 90-91). He testified that the livestock were sold through his Turlock Livestock Auction Yard, and that Mr. Machado bought some of them to fill orders for various principals. Respondent Cozzi testified that during the sales, his employees would not know the identity of the persons for whom Mr. Machado was purchasing livestock, but that after the sales, Mr. Machado would tell them the names of the principals, including Imperial Cattle Company, involved in the complaint (Tr. 92-97). Respondent Cozzi testified that he had no interest in what Mr. Machado did with the livestock on which they shared the profits and losses, stating (Tr. 93-94):

We had no knowledge of where the cattle were going [un- after the sale (Tr. 93-97)], and whatever he [Mr. Machado] was on his own with the next outfit or company that he work with. When they came through our ring, that was the end of the line between him and I. The cattle were mine. If he could buy them, fine; if he couldn't he let them go, and the next man bought them.

....

Because, as far as I'm concerned, they're his [Mr. Machado] cattle after they went through the ring, and he bought them and that's up to him. It's an entirely different deal.

The controversy on appeal involves an investigation report prepared by complainant's first witness, Mr. Cazier. On direct examination, Mr. Cazier did no more than identify and explain the documents involved in the specific transactions alleged in the complaint (such as invoices, bank statements and checks), and he related where they were obtained. Many of the documents were taken from respondent⁴ Cozzi's Turlock Livestock Auction Yard, and most of the documents would have been made by or received by his Turlock Livestock Auction Yard (Tr. 7).

Although Mr. Cazier did no more on direct examination than identify and explain the documents and their source, he stated *on cross examination* that he researched the Act and regulations and made a report of the audit (Tr. 35-36). He further testified *on cross examination* that he made a recommendation that a sanction be imposed against respondent Machado, but not against Turlock Livestock Auction. At that point, respondent Cozzi's attorney made a request for the production of the investigation report. Specifically, Mr. Cazier's testimony and respondent's request are as follows (Tr. 37-38):

Q. Did you make a recommendation regarding your application of the research you said you did of the law? Did you make an application of that to the facts in your recommendation?

A. Yes, I did.

Q. And what was that recommendation?

A. That particular recommendation was directed toward Miguel Machado. I cannot recall at this point in time the exact words that I used. I recommended that a sanction be taken against him.

Q. That recommendation was in the form of a report that included the documentary evidence that you'd obtained plus a statement by you to whomever your superior, I suppose, was

A. Yes.

...

Q. Did your recommendation to Mr. Freeze include any proposed action be taken against Turlock Livestock Auction?

A. No, it did not.

MR. OLSEN: Your Honor, at this point, I'd like to move that the Government be required to produce that report. I think it could be relevant to this case, and it could be considered—It could be produced after the hearing and be considered if, in fact, it is relevant to the case.

I think it very well could be, and I think it would be appropriate that the Government produce it for the record.³

Judge Palmer at first ruled that he would not require production of the investigation report since there had been an exchange of materials and a prehearing conference, without a request for the report (Tr. 39). Respondent's counsel then argued (Tr. 39-40):

MR. OLSEN: Your Honor, I can understand your concern. I don't see that it would be apt to delay the proceeding. I think the record is rather incomplete even though we've got the witness' statement that there was no recommendation with regard to Turlock. There apparently was a reason for that, and at some point, there was a decision made by somebody to include Turlock in the complaint, and I think it would enhance the record; maybe not for purposes of this hearing, but for future in case there's an appeal.

I don't think—If the only reason it's not going to be produced—And I am not asking that it be admitted in evidence at this point, but I would like to see it produced so that we would have the opportunity to examine it, and I think this can be done in a matter of days. It's not going to delay the proceeding.

Notwithstanding complainant's objections, Judge Palmer directed complainant to send a copy of the investigation report to respondent, but to advise Judge Palmer if there was any need to leave

³ Following Mr. Cazier's testimony on cross-examination, quoted above, that he did not recommend any action against Turlock Livestock Auction Yard, no further questions were asked of Mr. Cazier by either party. Specifically, respondent's counsel did not ask Mr. Cazier why he did not propose that any action be taken against Turlock Livestock Auction Yard.

out an informant's name, or some other matter. Judge Palmer stated that it was not his intention to reopen the hearing or to receive the report, but that after respondent received the report, Judge Palmer would see whether any motion was made or what action should be taken (Tr. 41-42).

At the conclusion of the hearing, Judge Palmer set the time for filing briefs and for complainant to file "any exculpatory material that they may have that hasn't already been furnished to the Respondent, which will include any material of that sort that would be contained in the investigative report" (Tr. 100).

Complainant did not comply with Judge Palmer's direction to deliver its investigation report to respondent but, rather, set forth in its brief filed September 16, 1982, the Department's Rules of Practice as to the Jencks Act and the definition of "statement" in the Jencks Act, quoted in section I above, and argued (Brief at 10):

The Rules of Practice require that a motion for production of "Jencks Act" materials must be founded on direct examination testimony. Respondent Cozzi's motion for production of the entire investigation report was founded on testimony elicited on cross examination. The only "statement" made by Mr. Cazier in that report is a one-page memorandum signed by Mr. Cazier and his co-worker addressed to their supervisor which merely corroborates Mr. Cazier's testimony at hearing. It bears no relevance to any material issue in this case. There are no materials in that report, including this "statement," which could be classified as exculpatory. For these reasons, complainant has no "statement" in its possession subject to delivery to respondent Cozzi under applicable law.

On October 25, 1982, respondent, relying solely on the Department's rules of practice incorporating the Jencks Act, filed a motion to compel complainant to produce any statements by Mr. Cazier made prior to the hearing relating to the subject matter of his testimony. Complainant opposed the motion on October 29, 1982, arguing that the Jencks Act was inapplicable to the facts of this case. Complainant stated, *inter alia* (Response at 3):

In fact, Mr. Cazier's investigation report recommendation was *silent* as to respondent Cozzi, but even if he had *expressly* recommended no action be taken against respondent Cozzi, that fact would have no bearing on any material issue in this case. It should be patently obvious that opinions expressed by an investigator to his supervisor in an internal agency memorandum are

not competent, relevant or material evidence of violations of the Packers and Stockyards Act.

Judge Palmer then ordered in a ruling filed November 4, 1982, that the material be submitted to him for examination *in camera*, stating:

Upon consideration of respondent's motion for production and complainant's response thereto, complainant is hereby ordered to deliver the materials in question to my secretary so that I may examine them in camera. To the extent the materials reveal the name of an informant or otherwise are of the sort complainant believes should be treated with confidentiality, complainant's counsel should supply my secretary with a note to that effect, which will not be made part of the record or supplied to opposing counsel.

Although many of complainant's objections under the Jencks Act are most persuasive, nevertheless it is Department's established policy to furnish all materials that are in any sense exculpatory, which includes the right to cross-examine inspectors on their investigative memoranda. See, *Mountainside Butter and Egg Company*, 39 Agric. Dec. 862, 873 (1980).

Following Judge Palmer's ruling, complainant filed a motion on November 9, 1982, requesting Judge Palmer to certify the question to the Judicial Officer under the Department's Rules of Practice (7 C.F.R. §1.143(e)), stating (Motion at 1, 2, and 4):

Complainant fears no harm from *in camera* inspection of the investigation report. For that matter, we have no fear that any substantial harm to complainant in the instant case could come from turning over the investigation report to respondent. However, the November 4 order creates a dangerous precedent prejudicial to the efficient conduct of future proceedings, and is, in our view, unsupported by the law.

....

Moreover, such a result clearly would have a chilling effect on the agency deliberative process. Investigators, supervisors and attorneys alike, would labor under the threat that differences of opinion could become aired in litigation as a matter of course. Basically, that is the rationale behind the agency deliberative privilege. And although the agency deliberative privilege may fall in the face of a clear showing of Jencks Act materials, that is not the situation here. No Jencks Act materials have been shown to exist. Respondent's motion must therefore be denied as violative of agency deliberative privilege. . . .

....

Unlike *Mountainside*, the attitude and judgment of complainant's witness Cazier has not been shown to be relevant to any material issue in this case. It was therefore appropriate that the Administrative Law Judge declined to rule that Mr. Cazier's attitude and judgment, as manifested in his recommendation, is relevant. (Tr. 40-41) Again, unlike *Mountainside*, Mr. Cazier's credibility is not in question. His written recommendation in the investigation report merely corroborates his testimony at hearing, *i.e.*, he made no express recommendation to name respondent Cozzi in a complaint. But even if Mr. Cazier's credibility were to be indisputably impeached, that result would have no material effect upon complainant's case. Mr. Cazier simply introduced documents prepared by other people. No element of complainant's case is dependent upon his testimony.

Complainant's motion to certify the question to the Judicial Officer was denied by Judge Palmer on November 9, 1982.

On November 30, 1982, complainant filed a Further Response stating that it has concluded, for the reasons previously stated, that it cannot comply with Judge Palmer's order to produce the investigation report for *in camera* inspection.

On December 9, 1982, Judge Palmer again ordered complainant to produce the investigation report for *in camera* examination, referring *sua sponte* to the *Brady* doctrine as well as the Jencks Act doctrine. On December 14, 1982, respondent filed a motion to dismiss the action or for a default judgment because of complainant's failure to comply with Judge Palmer's order.

On December 20, 1982, complainant filed a motion for a clarification of Judge Palmer's ruling. Attached to that motion, complainant filed a list of the materials in the investigation report, as follows:

LIST OF MATERIALS IN INVESTIGATION REPORT

- | | |
|---|---------|
| 1. Synopsis of Facts | 1 page |
| 2. "Details" which constitutes an expanded table of contents with summaries of facts shown by exhibits. | 7 pages |
| 3. Index of Exhibits | 2 pages |

4. Memorandum from Wendell Cazier and William H. Blakemore, investigators, to Kenneth Freeze, supervisor, containing recommendation of the investigation. 1 page
5. Exhibits including face plates to exhibits; copies of Packers and Stockyards Administration registration records; an annual report, schedules of transactions; tabulations of invoices, affidavit from James Delfino, Imperial Cattle Co.; memo to file regarding Fresno Meat Packing; affidavit from Clarence Lacque, Orland Livestock Commission Yard; memo to file regarding Machado's failure to maintain adequate books and records; copies of livestock transaction invoices, related financial documents; and copies of accounting records of respondents. 627 pages

In the December 20, 1982, motion for clarification, complainant asked (Motion at 1, 3):

1. What materials in complainant's possession are subject to the *in camera* inspection order?

....

2. Is our understanding correct that if materials are produced for *in camera* examination, after such examination the Administrative Law Judge will either issue a ruling that he has found nothing subject to compulsory disclosure or a ruling that he has found such materials, which complainant will then be ordered to disclose to respondent?

Complainant stated in the December 20, 1982, motion for clarification (Motion at 4):

Although we do not question that the Administrative Law Judge has authority to order *in camera* inspection under proper circumstances, we have many objections to this *in camera* order because we do not believe this case presents the proper circumstances for such inspection. Nevertheless, we have not ruled out the possibility that we may waive those objections at this stage in this proceeding if we can be assured that doing so will not unfairly prejudice complainant in this or any other case.

In Judge Palmer's ruling filed December 21, 1982, as to complainant's motion for clarification, Judge Palmer made it clear that he would determine what materials, if any, were exculpatory, and that he would send such materials directly to respondent. (That would not have afforded complainant the opportunity to elect not to produce the materials, and to appeal from Judge Palmer's determination at the appropriate time.) Specifically, Judge Palmer ruled:

Upon consideration of complainant's motion and request, complainant shall file the entire investigative report with my secretary by January 3, 1983, or seven days from service of this ruling, whichever occurs later. It is my intention to review the file at that time and send to respondent any materials that would, in my opinion, appear to be exculpatory.

In the event the investigative report is not filed, respondent's motion to dismiss the complainant shall be granted, on the basis that I must necessarily infer that the investigative report does contain materials which would exculpate respondent.

Complainant filed a reply on December 28, 1982, stating that, for the reason previously set forth, it cannot comply with the ruling ordering *in camera* examination of the investigation report. Thereafter, on December 30, 1982, Judge Palmer dismissed the complaint.

Since the issues involved here are of great importance to the Packers and Stockyards Administration, and similar issues may arise under numerous regulatory programs administered by the Department, it is appropriate to discuss in detail all ramifications of the issues involved, even though any one of several issues would be decisive.

III. USDA Policy under the Packers and Stockyards Act As to Discovery and Investigation Reports Does Not Support Production of Complainant's Investigation Report.

Neither the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) nor the Rules of Practice (7 C.F.R. §§1.130-.151) provide for discovery, and, therefore, discovery is not available to a respondent in a Packers and Stockyards Act disciplinary case. *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1600 (1976) (ruling on certified question), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980). This is in sharp contrast to the Federal Rules of Civil Procedure

and the Federal Rules of Criminal Procedure, both of which provide for extensive discovery.

The Department's policy as to discovery under the Packers and Stockyards Act is stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, 206-07 (1981), as follows (footnotes omitted):

In a case involving exhibits or expert testimony, the complainant's attorney may furnish the exhibits and expert testimony to the respondent prior to hearing. However, the rules of practice do not provide for discovery, and it has been held that discovery is not available to the respondent in Packers and Stockyards Act disciplinary cases.

Except for expert witnesses, the department generally will not advise a respondent of the names of prospective witnesses. Where a party has obtained subpoenas from the judge, the requests for subpoenas and the subpoenas are not filed with the hearing clerk and, therefore, the other party is not aware of the subpoenas until the witnesses testify. The agency's refusal to reveal the names of prospective witnesses is to prevent economic pressure from being brought to bear on them which might change their testimony.

The Packers and Stockyards Administration has always preserved the confidentiality of investigation reports. I am not aware of a single instance in which the agency has permitted a respondent to see all, or any part, of an investigation report, except for exhibits furnished in advance of hearing to a respondent, that are later to be introduced in evidence. There are substantial reasons for that policy.

First, there is a need to protect the confidentiality of informants so that no reprisals will be taken against them.

Second, even if the identity of informants could be protected by excising portions of an investigation report, potential informants in future cases might *fear* that their identity would be revealed if excised investigation reports were freely available to respondents. That is, they might fear that some argument or circumstance might result in a determination to release their names to the respondent.

Third, there is a need to prevent respondents in some cases from learning the names of potential witnesses to eliminate the possibility of economic pressure against the witness before the hearing.

Fourth, respondents or their attorneys who obtained investigation reports could learn important investigative techniques or agency practices that would make enforcement of the Act in the fu-

ture more difficult. I am personally aware of obstacles that could be placed in the paths of agency investigators if respondents were knowledgeable as to all of the agency's investigative techniques and procedures. This danger is particularly acute under the Packers and Stockyards Act since a few attorneys or firms handle a significant number of cases under the Act, and some have substantial contacts (e.g., through trade associations) with persons regulated under the Act.

Fifth, if material such as is desired by respondent in this case were made available to respondents, viz., memoranda indicating why an agency auditor did not recommend that an action be brought against respondent's Turlock Livestock Auction Yard, and if someone else decided to the contrary, agency personnel would no longer feel free to set forth opinions or legal analyses in investigation reports. All opinions and analyses would have to be relayed orally, which would greatly hamper enforcement efforts and efficient administration of this remedial statute.

For these reasons, it is the Department's established policy to protect the confidentiality of investigation reports under the Packers and Stockyards Act to the maximum extent permitted by law and to prevent respondents from having access to investigation reports or portions thereof insofar as legally possible.

Judge Palmer's ruling filed November 3, 1982, recognizes that "many of complainant's objections under the Jencks Act are unpersuasive," but he states that "nevertheless it is Department's established policy to furnish all materials that are in any sense exculpatory, which includes the right to cross-examine inspectors and their investigative memoranda. See, *Mountainside Butter and Egg Company*, 39 Agric. Dec. 862, 873 (1980)."

However, *Mountainside* does not support Judge Palmer's view as to the Department's policy. In *re Mountainside Butter and Egg Co.*, 39 Agric. Dec. 862, 873 (1980), *aff'd*, No. 80-3898 (D. N.J. Jan. 23, 1982), *appeal docketed*, No. 82-5788 (3d Cir. Dec. 21, 1982), cited by Judge Palmer, is merely a case where statements were furnished to the respondent in accordance with the Jencks Act. Prior to the final decision in *Mountainside*, cited by Judge Palmer, the proceeding had been remanded to the Administrative Law Judge so that respondents could cross-examine key Department witnesses with respect to memoranda they had written. In *re Mountainside Butter and Egg Co.*, 38 Agric. Dec. 789, 796-98 (1978). A major issue in *Mountainside* was whether the Department's inspectors were hostile to respondent's personnel and, therefore, did not administer the inspection service in a fair and reasonable manner. In

Poggio, one of the inspectors who as a key witness in the case, testified on direct examination (I&G Docket No. 64, Tr. 299):

Q. Do you have any ill feelings towards the Mountainside management, the Goldsmans?

A. No. In fact, I enjoy talking to them. Over the 15 months I was there, they instructed me on, say, horticulture, on different things beside the egg business. Lots of different conversations. I enjoyed talking with every one of them.

Mr. Hoerning, a supervisory inspector who was also a key witness, testified on direct examination (I&G Docket No. 64, Tr. 621):

Q. Were you aware of any hostility by your inspectors towards the Goldsmans?

A. No.

The Administrative Law Judge stated in his original, initial decision in *Mountainside*, before the remand:

Respondent next asserts that it has been picked on by inspectors who are trying to impress their supervisor, are too strict and fussy, are aggressive to the point of belligerence, are anti-Semitic, and have otherwise not administered inspection services in a fair and reasonable manner.

Four different inspectors testified and each recounted the same pattern of violations. Their testimony is found to be more credible and reliable than that given in respondent's behalf. Each inspector is found to have conducted inspections at respondent's plant in a fair and reasonable manner consistent with inspections conducted at all other official plants.⁴

The specific statements ordered by the Judicial Officer to be furnished to Mountainside Butter and Egg Company for the remand hearing were written by Mr. Poggio and Mr. Hoerning, quoted above. The statements were not part of any investigation report, and they were not *investigative* memoranda. They were intra-office memoranda written by the inspection service witnesses in the course of their inspection service duties. The memoranda set forth strong feelings and opinions as to the "Goldsman family," who oper-

⁴ The original, initial decision was reissued, after remand, "without modification," except for the omission of one finding of fact. *In re Mountainside Butter and Egg Co.*, 39 Agric. Dec. 862, 874 (1980), *aff'd*, No 80-3898 (D. N.J. June 23, 1982), *appeal docketed*, No. 82-5788 (3d cir. Dec. 21, 1982). The above quotation, which is included in the original and reissued initial decision, is from 39 Agric. Dec. at 871.

ated the Mountainside plant.⁵ Since the attitude of these key witnesses towards the "Goldsman family" was a vital issue in the case, the memoranda expressing strong feelings towards the Goldsmans was directly related to their direct testimony in the case. Accordingly, the Jencks Act required production of the memoranda. *United States v. Peters*, 625 F.2d 366, 369-71 (10th Cir. 1980); *United States v. Pacelli*, 491 F.2d 1108, 1118-20 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. O'Brien*, 444 F.2d 1082, 1086-87 (7th Cir. 1971).

Hence, *Mountainside* is no support for the Administrative Law Judge's view as to the Department's policy as to investigative memoranda.

The Department's policy to be applied here is that discovery is not available to a respondent in a Packers and Stockyards Act proceeding, the confidentiality of a Packers and Stockyards Act investigation report should be protected to the maximum extent permitted by law, and respondents should be prevented from having access to such a report, or any part thereof, insofar as legally possible.

IV. Under the Jencks Act, the Trial Judge Can Only Direct the Government to Deliver Material to the Defendant; He Cannot Deliver It Personally or Dismiss the Complaint if the Government Refuses to Comply.

Judge Palmer expressly stated in his ruling filed December 21, 1982, as to complainant's motion for clarification filed December 20, 1982, that if, after reviewing the investigation report *in camera*, he found any exculpatory materials, he would send the materials to respondent, rather than merely direct complainant to deliver the materials to respondent. He stated:

It is my intention to review the file at that time and send to respondent any materials that would, in my opinion, appear to be exculpatory.

Judge Palmer's ruling, in this respect, is contrary to the express provision of the Jencks Act, which state (18 U.S.C. §3500(b)-(d)):

⁵ In the Department's inspection and grading programs, there is the possibility of friction developing between the Department's personnel and plant personnel since the inspectors and graders work regularly in the same plant over substantial time periods making judgment decisions day by day that significantly affect the value of the products. However, rarely does friction develop between a Packers and Stockyards Act investigator or auditor and the regulated industry. If it did, there are nine layers of review before an investigation report results in a formal complaint (see §VI-A, p. 67, *infra*).

(b) ... If the entire contents of any such statement relate to the subject matter of the testimony of the witness, *the court shall order it to be delivered* directly to the defendant for this examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, *the court shall then direct delivery of such statement* to the defendant for his use. ...

(d) *If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that mistrial be declared. (Emphasis added.)*

Under the Jencks Act procedure set forth above, the court has no power to deliver a witness' statement directly to the defendant, but can only order the Government to deliver the statement to the defendant. That procedure preserves a very important right for the Government, *viz.*, the right ultimately to lose a case, if necessary, rather than release information to a defendant. That important right was recognized by the Court in the case which gave rise to the Jencks Act. Specifically, the Court stated in *Jencks v. United States*, 353 U.S. 657, 672 (1957):

We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. ... The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

In the present case, complainant's motion filed December 20, 1982, suggests that complainant might have been willing to submit

its investigation report to Judge Palmer for *in camera* examination if complainant were assured that Judge Palmer would do no more than merely issue a ruling that he found nothing subject to compulsory disclosure, or a ruling ordering complainant to disclose certain material to respondent.⁶

However, complainant was understandably unwilling to furnish the investigation report even for *in camera* examination under Judge Palmer's ruling that, if he found any material subject to disclosure, he would send the material directly to respondent. That would have established a dangerous precedent which is totally unacceptable to complainant and not authorized by the Jencks Act.

Furthermore, if the trial judge orders the Government to deliver a Jencks Act statement to the defendant, and the Government elects not to comply, the only sanction authorized by the Act is for the judge to "strike from the record the testimony of the witness . . . unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared." 18 U.S.C. §3500(d). In the case of a mistrial, the Government can, of course, proceed with the case before a different jury. In an administrative proceeding tried before an Administrative Law Judge, there is no jury or mistrial procedure.

Since the Department's Rules of Practice incorporate the Jencks Act procedures, if complainant elects not to comply with a Jencks Act order, the only Jencks Act sanction that can be imposed by the Department's Administrative Law Judge is to strike the testimony of the witness.⁷

Accordingly, even if complainant's investigation report were producible under the Jencks Act, Judge Palmer had no authority under the Act to (i) send exculpatory material directly to the respondent, or (ii) dismiss the complaint.

⁶ Following the proper procedure permits complainant to submit an investigation report to the Administrative Law Judge without fear that it will be released to the respondent, while preserving complainant's right to appeal to the Judicial Officer, at the appropriate time, from the Judge's determination as to producibility. If (i) Judge Palmer had indicated that he would merely direct producible material to be furnished to respondent, (ii) complainant had submitted the investigation report for *in camera* examination, and (iii) Judge Palmer found no producible material, the present appeal, with its attendant delay, would have been unnecessary.

⁷ Although the *Jencks* decision refers to dismissing a complaint when the Government elects not to comply with an order to produce statements or reports (353 U.S. at 672), the *Jencks* Act, rather than the *Jencks* decision, is now controlling. See *Palermo v. United States*, 360 U.S. 343, 350-51, 353 n. 11 (1959); *Foster v. United States*, 308 F.2d 751, 755 (8th Cir. 1962).

V. Complainant's Investigation Report Is Not Producible in Whole or in Part under the Jencks Act in the Circumstances of this Case, and an In Camera Examination Is Not Appropriate Here.

There are a number of reasons why complainant's investigation report is not producible in whole or in part under the Jencks Act in the circumstances of this case, any one of which is decisive. But in view of the great importance of having the Jencks Act properly applied in the Department's disciplinary proceedings, each reason is discussed below in subsections A-E of this section.

In subsection F, two circumstances *not* relevant to the determination that the investigation report is not producible are discussed, and in subsection G it is explained why an *in camera* examination of complainant's investigation report is not appropriate in the circumstances of this case.

A. Respondent Was Improperly Attempting to Engage in a General Fishing Expedition, and Failed to Make a Proper Request for the Production of a Jencks Act Statement.

1. Respondent's Attempt to Engage in a General Fishing Expedition Is Not Authorized.

In the present case, respondent's counsel made it clear that he was not merely requesting a statement made by the witness who had testified, but, rather, was demanding that the entire investigation report be furnished so that he could rummage through the report to see if there was anything useful relating to why the witness did not recommend action against Turlock Livestock Auction Yard, and why someone else recommended such action Respondent's request was as follows (Tr. 37-40):

Q. Did you make a recommendation regarding your application of the research you said you did of the law? Did you make an application of that to the facts in your recommendation?

A. Yes, I did.

Q. And what was that recommendation?

A. That particular recommendation was directed towards Miguel Machado. I cannot recall at this point in time the exact words that I used. I recommended that a sanction be taken against him.

Q. That recommendation was in the form of a report that included the documentary evidence that you'd obtained plus a statement by you to whomever your superior, I suppose, was.

A. Yes.

....

Q. Did your recommendation to Mr. Freeze include any proposed action be taken against Turlock Livestock Auction?

A. No, it did not.

MR. OLSEN: Your Honor, at this point, I'd like to move that the Government be required to produce that report. I think it could be relevant to this case, and it could be considered—It could be produced after the hearing and be considered if, in fact, it is relevant to the case.

I think it very well could be, and I think it would be appropriate that the Government produce it for the record.

....

MR. OLSEN: Your Honor, I Can understand your concern. I don't see that it would be apt to delay the proceeding. I think the record is rather incomplete even though we've got the witness' statement that there was no recommendation with regard to Turlock. There apparently was a reason for that, and at some point, there was a decision made by somebody to include Turlock in the complaint, and I think it would enhance the record; maybe not for purposes of this hearing, but for future in case there's an appeal.

I don't think—If the only reason it's not going to be produced—And I am not asking that it be admitted in evidence at this point, but I would like to see it produced so that we would have the opportunity to examine it, and I think this can be done in a matter of days. It's not going to delay the proceeding.

Respondent's attempt to engage in a general fishing expedition through complainant's entire investigation report violates the principal purpose of the Jencks Act. The principal purpose of the Jencks Act is to prevent defendants from roving at will through Government files as a result of misinterpretations of the *Jencks* decision. *Goldberg v. United States*, 425 U.S. 94, 104 (1976); *Palermo v. United States*, 360 U.S. 343, 350, 354 (1959); *United States v. Pope*, 574 F.2d 320, 324 (6th Cir.), *cert. denied*, 439 U.S. 868, 436 U.S. 949, 436 U.S. 929 (1978); *United States v. Nickell*, 552 F.2d 684, 388-89 (6th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); *United States v. Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *United States v. Catalano*, 491 F.2d

268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); and see *Foster v. United States*, 308 F.2d 751, 755-56 (8th Cir. 1962).⁸

"The Act's major concern is with limiting and regulating defense access to government papers" (*Palermo v. United States*, 360 U.S. 343, 354 (1959)). Congress "was concerned . . . with 'misinterpretations and misunderstandings' in application of *Jencks* in district courts and courts of appeals. . . . The concern was that misapplication of *Jencks* would permit defendants 'to rove at will through Government files.' " *Goldberg v. United States*, 425 U.S. 94, 104 (1976). As stated in *United States v. Pope*, 574 F.2d 320, 324 (6th Cir.), *cert. denied*, 439 U.S. 868, 436 U.S. 949, 436 U.S. 929 (1978):

It is evident from its legislative history that the *Jencks* Act was principally designed to make certain that *Jencks v. United States* was not misinterpreted by lower courts to expose government files in criminal prosecutions to blind fishing expeditions.

Respondent's request here is similar to the defendant's request denied in *Foster v. United States*, 308 F.2d 751, 755-56 (8th Cir. 1962), in which the court stated:

Here it became perfectly apparent that counsel was demanding and would be satisfied with nothing less than the government's entire file—this without foundation or inference other than counsel's present *ipse dixit*, appearing in his brief in this court, to the effect that the entire file was Agent Hall's statement. This was nothing more or less than a desire to go upon a " * * * broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up", as referred to by the Supreme Court in *Gordon v. United States*, 1953, 344 U.S. 414, 419, 73 S.Ct. 369, 373, 97 L.Ed. 447, and *Jencks v. United States*, *supra* at pages 666-667 of 353 U.S., 77 S.Ct. 1007. There is nothing in §3500 [the *Jencks* Act] or in the cases construing its application which justifies the conclusion that the government can be forced to produce its entire files for inspection by defendant's counsel or by the court in order to determine if it contains some pertinent matter which might be of assistance to the defense.

⁸ Another purpose of the *Jencks* Act, however, is to reaffirm the Court's holding in *Jencks* that a defendant is entitled to certain material in possession of the Government touching the matters to which a Government witness has testified. *Goldberg v. United States*, 425 U.S. 94, 104 (1976); *United States v. Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *United States v. Catalano*, 491 F.2d 268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

"The [Jencks] Act does not authorize fishing expeditions by the defendant," *United States v. Graves*, 428 F.2d 196, 199 (5th Cir.), *cert denied*, 400 U.S. 960 (1970); *accord*, *United States v. O'Brien*, 444 F.2d 1082, 1085 (7th Cir. 1971), or an "unrestrained search through government files." *United States v. Catalano*, 491 F.2d 268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

Respondent's attempt to engage in a general fishing expedition by rummaging through complainant's entire investigation report is plainly contrary to the purpose and provisions of the Jencks Act.

2. Respondent Failed to Make a Proper Request for a Jencks Act Statement.

As shown in subdivision 1 of this subsection, immediately above, respondent did not limit his request to a witness' "statement" under the Jencks Act. Accordingly, he failed to make a proper request for production of a Jencks Act statement. 18 U.S.C. §3500(b).

The Jencks Act is not self-executing. That is, complainant is under no duty to produce a Jencks Act statement until directed to do so by the trial judge based on a proper and timely motion by respondent. Specifically, the Act provides (18 U.S.C. §3500(b)):

(b) After a witness called by the United States has testified on direct examination, the court shall, *on motion of the defendant*, order the United States to produce any *statement (as hereinafter defined)* of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. (Emphasis added.)

Accordingly, before it is appropriate for the trial judge to order a Jencks Act "statement" to be produced, and before complainant is under any obligation to furnish such "statement" to the respondent, there must be a proper and timely motion made by respondent for a witness' "statement."

Respondent's request for the entire investigation report, rather than just for the statement of the witness who had testified, was fatally defective. The situation here is parallel to the situation involved in *Foster v. United States*, 308 F.2d 751, 754-55 (8th Cir. 1962), in which the court denied a request under the Jencks Act for an entire investigation file because the request was not limited merely to the statements of the witness, stating:

Without at any time being specific, defendant's counsel continued to demand the entire file, that it be made available to him or that the court examine it. This was denied. . . .

. . . .

At no time does counsel for the defendant make it clear exactly what he is asking for excepting only that he was demanding the government's entire file so that he could see whether it contained anything helpful to him or not. . . . At this stage in the trial, Hatcher and Hall were the only government witnesses who had testified and, as stated, defense counsel had received Hall's 8-page signed report and three statements signed by Hatcher referred to in Hall's report. There may have been, and very probably were other statements contained in the Narcotics Agent's investigation file to which counsel would have been entitled upon proper and timely request. It is, however, incumbent upon the defense to be definitive in their request, at least to the extent of limiting their demands to "statements" before there is any duty on the prosecution or the court to seek out and produce such material.

Similarly, in *Ubiotica Corp. v. FDA*, 427 F.2d 376, 381-82 (6th Cir. 1970), the court denied a request under the Jencks Act to produce an entire Government file because the request was not limited to producible statements, stating:

On the other hand, the *Jencks* doctrine has not been extended to require the Government to produce an entire file; various reports and intra-agency communications of a federal agency have generally been regarded as free from disclosure. . . .

Petitioner moved under the guise of the *Jencks* doctrine to require the Government to produce all records, memoranda, and work products under the control of the Food and Drug Administration with respect to the "U" Series Drugs. The hearing examiner denied the motion after petitioner failed to specify those documents which it felt were producible with appropriate citations to the transcript of the hearing. Petitioner's demand was overly broad within the rationale of *Jencks* and was properly denied.

Since respondent requested the Government's entire investigation report, rather than only the witness' statement, respondent's request under the Jencks Act was fatally defective.

3. Respondent's Request Was Timely.

A Jencks Act request must be made at the proper time. Complainant contends that respondent's request was not timely because it came at the conclusion of the witness' cross-examination rather than immediately after his direct examination. But the Act does not require that the request be made immediately after direct examina-

tion. Although a Jencks Act request should be denied if it comes too early or too late, a request made during the course of cross-examination is not untimely.

First, a Jencks Act request should be denied if it comes too early. For example, in *United States v. Harris*, 458 F.2d 670, 679 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972), the court stated:

[W]e conclude that Harris was under obligation to request production of the statement within a reasonable time proximate to the direct testimony so as to alert the district judge and the government of the nature of his request. Preferably, that request should be made immediately before, during, or immediately after the direct examination, although circumstances might permit requests at different points during the trial. In this case, Harris made a pre-trial motion for discovery that was part *Brady*, part Jencks, and the district judge properly denied that pre-trial motion. . . . At the very least, Harris was under obligation to alert the trial judge to his Jencks Act request during the course of the trial and not simply by means of some multi-pronged pre-trial motion most appropriately termed "fishing." . . . The orderly administration of a trial, to which the Jencks Act and the Federal Rules propose to give effect, requires no more, but no less, than a timely motion.

Second, a Jencks Act request should be denied if it comes too late. For example, in *United States v. Clay*, 495 F.2d 700, 709-10 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974), the court stated:

Because the defendants could only properly use such a [Jencks] statement to impeach the testimony of Kelly during cross-examination, the motion for production made at the conclusion of the trial was not timely. Therefore, we find no error in the court's denial of the motion.

However, a Jencks Act request made during the course of cross-examination is permissible. *Goldberg v. United States*, 425 U.S. 94 100-01 (1976), is a case in which the Jencks Act request was made during the course of cross-examination, rather than immediately following direct examination, and, although no issue was raised as to the timeliness of the motion, the Court held that the motion was improperly denied. Similarly, in *United States v. Harris*, 458 F.2d 670, 679 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972), quoted above in this subdivision, the court stated that the request must be made "within a reasonable time proximate to the direct testimony," *preferably* "immediately before, during, or immediately after the direct examination, although circumstances might permit requests at dif-

ferent points during the trial." Accordingly, respondent's request was timely made (if he had wanted to examine the statement for possible use during further cross-examination), although failing for other reasons.

B. Respondent Was Improperly Seeking Production of Legal Reasoning, Interpretations, Opinions or Analyses Set Forth in Complainant's Investigation Report.

Closely related to subsection A-1 above (involving respondent's improper attempt to conduct a general fishing expedition) is that respondent's request is improper because he was seeking to find material showing why the witness who testified did not recommend a proceeding against respondent's Turlock Livestock Auction Yard, and why someone else decided to include Turlock in the complaint.

In other words, respondent was looking for the witness' legal reasoning or interpretation of the Act or analysis of the evidence leading him not to recommend action against Turlock, and the contrary legal reasoning, interpretation or analysis leading to the inclusion of Turlock in the complaint. It is well settled that such material is not a producible "statement" under the Jencks Act. *United States v. Dark*, 597 F.2d 1097, 1099 (6th Cir.), cert. denied, 444 U.S. 927 (1979); *Ubiotica Corp. v. FDA*, 427 F.2d 376, 381-82 (6th Cir. 1970); *In re Coca-Cola Co.*, 85 F.T.C. 398, 399 (1975); and see *Palermo v. United States*, 360 U.S. 343, 350-51 (1959); *Foster v. United States*, 308 F.2d 751, 754-56 (8th Cir. 1962).

The committee reports of both Houses and the floor debates" relating to the Jencks Act show that it was "strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest," and the committee reports and floor debates "clearly manifest the intention to avoid these dangers by restricting production to those statements specifically defined in the bill." *Palermo v. United States*, 360 U.S. 343, 350 (1959).

On the other hand, not everything included in an investigation report is free from production under the Jencks Act. A Government investigator's written report of events to which he has testified at trial is producible, even though it is included in an investigation report. *United States v. Cleveland*, 477 F.2d 310, 315-16 (7th Cir. 1973); *United States v. Berry*, 277 F.2d 826, 827-30 (7th Cir. 1960); and see *Foster v. United States*, 308 F.2d 751, 756 (8th Cir. 1962).

The same principles apply with respect to statements prepared by Government lawyers. That is, just as in the case of a Government

investigator, "nothing in the Jencks Act or its legislative history . . . excepts from production otherwise producible statements on the ground that they constitute 'work product' of Government lawyers." *Goldberg v. United States*, 425 U.S. 94, 101-02 (1976).⁹ However, a Government lawyer's beliefs, conclusions, opinions, summaries, evaluations of evidence and views as to trial strategy are exempt from disclosure. *Goldberg v. United States*, 425 U.S. 94, 105-06 (1976); *United States v. White*, 671 F.2d 1126, 1133 (8th Cir. 1982); *United States v. Pfingst*, 477 F.2d 177, 195 (2d Cir.), cert. denied, 412 U.S. 941 (1973).¹⁰

As the Court stated in *Goldberg v. United States*, 425 U.S. 94, 105-06 (1976) (footnote omitted):

For the same reasons, we see no merit in the Government's argument, without an exception, disclosure of statements taken by Government lawyers may undermine the policies that give rise to the work-product doctrine. See *United States v. Nobles*, 422 U.S. 225, 236-239 (1975); *Hickman v. Taylor*, 329 U.S. 495 (1947). Proper application of the Act will not compel disclosure of a Government lawyer's recordation of mental impressions, personal beliefs, trial strategy, legal conclusions, or anything else that "could not fairly be said to be the witness' own" statement. "If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a 'statement.'" *Saunders v. United States*, 114 U.S. App. D.C. 345, 349, 316 F.2d 346, 350 (1963) (Reed, J.). Furthermore, if a witness has for some reason "adopted or approved" a writing containing trial strategy or similar matter, such matter would be excised under § 3500(c) as not relating to the subject matter of the witness testimony or direct examination. Thus, the primary policy underlying the

⁹ This is in contrast to the absolute immunity from disclosure given by the Freedom of Information Act to the "work product" of an attorney. See *FTC v. Grolier*, 51 U.S.L.W. 4660, 4660-62 (U.S. June 6, 1983) (No. 82-372).

¹⁰ Even under the liberal discovery provisions of the Federal Rules of Civil Procedure, discovery is not permitted as to the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Rule 26(b)(3). Similarly, such matters are not subject to discovery under the Federal Rules of Criminal Procedure, which exempt from discovery (except for a defendant's statement, a defendant's prior record, and reports of examinations and tests) "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case" (Rule 16(a)(2)).

work-product doctrine—*i.e.*, protection of the privacy of an attorney's mental processes, *United States v. Nobles, supra*, at 238—is adequately safeguarded by the Jencks Act itself.

Since respondent was seeking the production of material showing why the witness who testified did not recommend an action against Turlock, and why someone else recommended otherwise, respondent's request is not supported by the Jencks Act.

**C. Respondent Was Improperly Seeking Production of
Material Not Relating to a Witness' Direct Testimony.**

As shown in section II of this decision, respondent was seeking the production of material relating to the cross-examination of complainant's witness Cazier, rather than the direct examination. On direct examination, Mr. Cazier did no more than identify and explain the documents involved in the specific transactions alleged in the complaint (such as invoices, bank statements and checks), and he related where they were obtained. However, on cross-examination he stated that he researched the Act and regulations and made a report of the audit in which he recommended that a sanction be imposed against respondent Machado, but not against respondent's Turlock Livestock Auction Yard.

Respondent has expressed no interest in seeing any material in the investigation report relating to Mr. Cazier's direct examination. Instead, respondent wants to see the material relating to Mr. Cazier's cross-examination, *viz.*, showing why the witness did not recommend that an action be brought against Turlock and, also, why someone else recommended that Turlock be included in the complaint. That is not permitted under the Jencks Act.

The Jencks act provides (18 U.S.C. §3500(b)):

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as herein-after defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. (Emphasis added.)

It is well settled that a witness' statement, to be producible under the Jencks Act, must relate to his *direct* testimony. *Goldberg v. United States*, 425 U.S. 94, 105, 110 (1976); *United States v. Jones*, 612 F.2d 453, 456 (9th Cir.), *cert. denied*, 445 U.S. 966 (1980);

United States v. Gaston, 608 F.2d 607, 609 (5th Cir. 1979); *United States v. Wood*, 550 F.2d 435, 440 (9th Cir. 1977); *United States v. Keller*, 512 F.2d 182, 186 (3d Cir. 1975); *United States v. Lepiscopo*, 458 F.2d 977, 979 (10th Cir. 1972); *United States v. O'Brien*, 444 F.2d 1082, 1085-86 (7th Cir. 1971); *United States v. Graves*, 428 F.2d 196, 198-200 (5th Cir.), *cert. denied*, 400 U.S. 906 (1970); *United States v. Mayersohn*, 413 F.2d 641, 643 (2d Cir. 1969), *cert. denied*, 397 U.S. 906 (1970); and *see United States v. Smaldone*, 544 F.2d 456, 461 (10th Cir. 1976), *cert. denied*, 42 U.S. 967 (1977); *United States v. Snow*, 537 F.2d 1166, 1168 (4th Cir. 1976); *United States v. Clay*, 495 F.2d 700, 709 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974).

In *Goldberg v. United States*, 425 U.S. 94, 105 (1976), the Court states that the Jencks Act "expressly provides a procedure for excising any matter not relevant to the witness' direct testimony." The Court in *Goldberg* remanded the case to the District Court, *inter alia*, to determine whether 40 pages of a witness' statement concerned matters other than his "direct testimony," in which case those pages would not be producible (*id.* at 109-10).

Similarly, in *United States v. O'Brien*, 444 F.2d 1082, 1085 (7th Cir. 1971), the court upheld the trial court's refusal to order the production under the Jencks Act of a statement relating to the witness' cross-examination, rather than his direct examination, stating:

Agent Grubert testified on direct examination solely concerning the arrest of defendant McMahon and a search made of his vehicle on August 22, 1969.... On cross-examination he testified he had made some investigation of defendants in April, 1969 and filed reports thereof. Again, we conclude and hold that the trial court did not err in denying defendants' motion to produce and to seal the reports of such investigation and make them a part of the record. As with Whitaker, such statements were completely unrelated to the direct testimony of the witness.

Since respondent was not seeking the production of a statement relating to Mr. Cazier's direct examination, respondent's request under the Jencks Act was fatally defective.

**D. Respondent Did Not Want to Use a Jencks Act
Statement During Cross-Examination, Which
Is Its Only Permissible Use.**

Respondent's request for complainant's investigation report was made at the conclusion of the cross-examination of complainant.

witness Cazier. After the request, no further questions were asked of the witness by either party (see note 3, *supra*). Respondent's counsel did not want to use the report during cross-examination of the witness but, rather, stated that "[i]t [the report] could be produced after the hearing and be considered if, in fact, it is relevant to the case" (Tr. 38).

Although the Jencks Act does not expressly limit the use of a Jencks Act statement to cross-examination, the courts have recognized that the purpose of a Jencks Act statement is for use on cross-examination. *Palermo v. United States*, 360 U.S. 343, 350 (1959); *United States v. Clay*, 495 F.2d 700, 709-10 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974); *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). As the court stated in *United States v. Clay*, 495 F.2d 700, 709-10 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974):

Because the defendants could only properly use such a statement to impeach the testimony of Kelly during cross-examination, the motion for production made at the conclusion of the trial was not timely. Therefore, we find no error in the court's denial of the motion.

Since respondent did not want to use complainant's investigation report during cross-examination of complainant's witness Cazier, his request for the report was fatally defective.

E. Respondent Did Not Want To Use a Jencks Act Statement For Impeachment, Which Is Its Only Permissible Use.

Respondent did not request complainant's investigation report until Mr. Cazier testified that he had recommended a sanction against respondent Machado, but not against respondent's Turlock Livestock Auction Yard. Immediately thereafter, respondent requested the investigation report.

Respondent obviously did not want to impeach Mr. Cazier's statement that he had not recommended an action against respondent's Turlock Livestock Auction Yard. Respondent naturally believes that testimony to be true, and shares Mr. Cazier's viewpoint entirely, in that regard. Respondent wants further information as to the "reason" for that recommendation, and why it was changed (Tr. 39-40). Respondent has never suggested that he disagrees with any of Mr. Cazier's testimony, and there is no basis for believing that respondent wants to impeach any of Mr. Cazier's testimony.

However, it is well settled that a Jencks Act statement can only be used for impeachment. *Campbell v. United States*, 373 U.S. 487,

497 (1963); *Campbell v. United States*, 365 U.S. 85, 86-87, 92 (1961); *Palermo v. United States*, 360 U.S. 343, 349 (1959); *United States v. Gaston*, 608 F.2d 607, 611-12 (5th Cir. 1979); *United States v. Smaldone*, 544 F.2d 456, 459, 462 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *United States v. Wiley*, 534 F.2d 659, 665 (6th Cir.), *cert. denied*, 425 U.S. 995 (1976); *United States v. Clay*, 495 F.2d 700, 709-10 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974); *United States v. Catalano*, 491 F.2d 268, 274-75 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States v. Graves*, 428 F.2d 196, 199 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970); *Foster v. United States*, 308 F.2d 751, 755 (8th Cir. 1962); *United States v. Berry*, 277 F.2d 826, 828, 830 (7th Cir. 1960).

The Jencks Act "manifests the general statutory aim to restrict the use of such statements to impeachment." *Palermo v. United States*, 360 U.S. 343, 349 (1959). "The purpose [of a Jencks Act statement] is impeachment only. The Act is one of limitation. It circumscribes what may be obtained and the purpose for which it may be used." *Foster v. United States*, 308 F.2d 751, 755 (8th Cir. 1962).

The "only permissible use" of a Jencks Act statement is "for impeachment purposes." *United States v. Smaldone*, 544 F.2d 456, 459 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977). The use of a Jencks Act statement is "limited to impeachment." *United States v. Gaston*, 608 F.2d 607, 612 (5th Cir. 1979); *accord*, *United States v. Graves*, 428 F.2d 196, 199 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970). As the court stated in *United States v. Clay*, 495 F.2d 700, 709-10 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974):

Because the defendants could only properly use such a statement to impeach the testimony of Kelly during cross-examination, the motion for production made at the conclusion of the trial was not timely. Therefore, we find no error in the court's denial of the motion.

Since respondent was not seeking to impeach the testimony of complainant's witness Cazier, respondent's request under the Jencks Act was fatally defective.

For all of the reasons set forth above in subsections A-E of this section, complainant's investigation report is not producible in whole or in part under the Jencks Act. Two other circumstances that are *not* relevant in reaching this determination are discussed below in subsection F to insure that there is no reliance on such circumstances in future cases.

**F. Respondent Need Not Show That a Jencks Act
Statement and the Witness' Testimony Are
Inconsistent, or That the Statement Is
Admissible in Evidence.**

In order for a witness' statement to be producible under the Jencks Act, it is not necessary that the statement be inconsistent with the witness' testimony. *Campbell v. United States*, 373 U.S. 487, 497 n. 13 (1963); *Palermo v. United States*, 360 U.S. 343, 353 n. 10 (1959); *United States v. Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); and *see Jencks v. United States*, 353 U.S. 657, 667 (1957). "Of course the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration." *Palermo v. United States*, 360 U.S. 343, 353 n. 10 (1959).

In *Jencks v. United States*, 353 U.S. 657, 667 (1957), which gave rise to the Jencks Act, the court stated:

Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related to the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Accordingly, if respondent's Jencks Act request had not been fatally defective in other respects, it would not have been relevant to determine whether the witness' report was inconsistent with his testimony.

Another irrelevant circumstance is the fact that Mr. Cazier's recommendation to his supervisor, which is the principal material sought by respondent, would not have been admissible in evidence. It would not have been admissible, in part, because it is an unsworn document (*see In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 (1982)), and respondent was not seeking to introduce it while Mr. Cazier was on the stand available for questioning.

Moreover, if Mr. Cazier had explained in his recommendation why he thought that an action was not warranted against respondent's Turlock Livestock Auction Yard, which explanation was particularly sought by respondent (but is non-existent according to complainant), that would have been opinion evidence on the ulti-

mate issue in the case by a non-expert witness.¹¹ The Department's procedure permits opinion evidence as to the ultimate issue in the case only by an expert witness. *In re Thornton*, 38 Agric. Dec. 1425, 1435, 1436 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *Western Iowa Farms Co. v. Sioux City Stock Yards*, 38 Agric. Dec. 209, 209-10 (remand order), *final decision*, 38 Agric. Dec. 1296 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1285, 1312 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 141-42, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

However, in determining producibility under the Jencks Act, it is immaterial "whether or not the statement is admissible as evidence." *Palermo v. United States*, 360 U.S. 343, 353 n. 10 (1959). Accordingly, if respondent's request had not been fatally defective under the Jencks Act for other reasons, it would have been immaterial that Mr. Cazier's recommendation was inadmissible in evidence.

**G. An In Camera Examination of a Witness'
Statement Is Appropriate in Doubtful
Cases, but Not Here.**

The Jencks Act does not specify the procedure to be followed in making the determination whether a particular statement is a "statement" as defined in the Act (18 U.S.C. §3500(e)). However, the court held in *Palermo v. United States*, 360 U.S. 343, 351 (1959), that such a determination should be made in doubtful cases by the trial judge's *in camera* examination. The Court stated (*ibid.*):

The statute itself [*i.e.*, the Jencks Act] provides no procedure for making a determination whether a particular statement comes within the terms of [18 U.S.C. §3500] (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit

¹¹ Mr. Cazier had only been employed by the Packers and Stockyards Administration for a year and a half, and he was not represented by complainant to be an expert witness as to policies and legal analyses under the Packers and Stockyards Act. His view as to Turlock obviously was not shared by more experienced employees of the Packers and Stockyards Administration and the Office of the General Counsel.

the statement to the trial judge for an *in camera* determination.

Accord, United States v. Berry, 277 F.2d 826, 828-29 (7th Cir. 1960).

Once it has been determined that the Government has a Jencks Act "statement," the Act expressly provides for an *in camera* examination by the trial judge to determine whether portions of the "statement" should be excised. *United States v. Peters*, 625 F.2d 366, 369-71 (10th Cir. 1980); *United States v. Jones*, 612 F.2d 453, 456 (9th Cir.), *cert. denied*, 445 U.S. 966 (1980); *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. Cleveland*, 477 F.2d 310, 315-16 (7th Cir. 1973); *United States v. O'Brien*, 444 F.2d 1082, 1086-87 (7th Cir. 1971); and *see United States v. Graves*, 428 F.2d 196, 200 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970). The Act states (18 U.S.C. §3500(c)):

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the *testimony of the witness*. (Emphasis added.)

The "testimony of the witness," in the quotation above, refers only to the testimony on direct examination (see §V-C, *supra*), and, therefore, the court must excise any portion of the statement that does not "relate" to the direct testimony of the witness. However, the word "relate" has been broadly construed. As stated in *United States v. O'Brien*, 444 F.2d 1082, 1086 (7th Cir. 1971):

[T]he word "relate" is not always limited to factual narratives.... In determining whether the statements in question "related to" the direct testimony of the witness, it must relate *generally to the events and activities testified to*.¹²

Nonetheless, "the defense is not entitled to statements which were merely 'incidental or collateral.'" *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

It is quite possible that complainant's investigation report contains a brief "statement," as defined in the Jencks Act, by Mr.

¹² *Accord, United States v. Peters*, 625 F.2d 366, 369-71 (10th Cir. 1980); *United States v. Pacelli*, 491 F.2d 1108, 1118-20 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

Cazier, of which at least a sentence or two, or possibly a paragraph or two, would have been producible under the Jencks Act. The investigation report may contain a brief statement by the witness relating to the matters involved in his direct testimony, i.e., relating to the invoices, bank statements and other documents received in evidence. Under proper circumstances, that portion of his statement would have been producible, after the bulk of the statement had been excised. See *United States v. Mason*, 520 F.2d 1122, 1128-29 (D.C. Cir. 1975); *United States v. Keller*, 514 F.2d 182, 186 (3d Cir. 1975); *United States v. Pfingst*, 477 F.2d 1122 (2d Cir.), cert. denied, 412 U.S. 941 (1973).

But respondent expressed no interest in seeing only the witness' statement. Instead, respondent wanted to see the entire investigation report. And respondent made it clear that he was particularly interested in seeing reasoning, opinions and analyses in the report, which is not a producible "statement" under the Act (§ V-B, supra).

If respondent (i) had not been attempting to engage in a fishing expedition, (ii) had made a proper request for the production of the witness' "statement," (iii) had not been seeking production of opinions, reasoning and analyses, (iv) had been seeking production of a statement relating to the witness' direct testimony, (v) had sought to use the statement during cross-examination, and (vi) had sought to use the statement for impeachment, it would have been appropriate for Judge Palmer to have reviewed *in camera* that portion of the investigation report that could conceivably contain the witness' statement to determine if it relates to the witness' testimony, and to excise those portions of the statement not relating to his direct testimony.

But in view of those fatal defects, discussed at length in sections A-E of this section, there was no basis for an *in camera* examination of the investigation report by Judge Palmer. See *United States v. Dark*, 597 F.2d 1097, 1099 (6th Cir.), cert. denied, 412 U.S. 927 (1979); *United States v. Nickell*, 552 F.2d 684, 687-70 (1st Cir. 1977); cert. denied, 436 U.S. 904 (1978); *Foster v. United States*, 308 F.2d 751, 754-56 (8th Cir. 1962).

As the court stated in *Foster v. United States*, 308 F.2d 754-56 (8th Cir. 1962), in holding that an *in camera* examination of a Government agent's investigation file was not appropriate:

Without at any time being specific, defendant's counsel continued to demand the entire file, that it be made available to them or that the court examine it. This was denied. . . .

....

... At this stage in the trial, Hatcher and [Agent] Hall were the only government witnesses who had testified and, as stated, defense counsel had received Hall's 8-page signed report and three statements signed by Hatcher referred to in Hall's report. There may have been, and very probably were other statements contained in the Narcotics Agent's investigation file to which counsel would have been entitled upon proper and timely request. It is, however, incumbent upon the defense to be definitive in their request, at least to the extent of limiting their demands to "statements" before there is any duty on the prosecution or the court to seek out and produce such material.

... Here it became perfectly apparent that counsel was demanding and would be satisfied with nothing less than the government's entire file—this without foundation or inference other than counsel's present *ipse dixit*, appearing in his brief in this court, to the effect that the entire file was Agent Hall's statement. . . . There is nothing in §3500 [*i.e.*, the Jencks Act] or in the cases construing its application which justifies the conclusion that the government can be forced to produce its entire files for inspection by defendant's counsel or by the court in order to determine if it contains some pertinent matter which might be of assistance to the defense.

In *United States v. Dark*, 597 F.2d 1097, 1099 (6th Cir.), *cert. denied*, 444 U.S. 927 (1979), in holding that an *in camera* examination of a Government agent's case file was not appropriate, the court stated:

Dark also argues that the trial judge erred in refusing to order the government to turn over to defense counsel, as "statements" under the Jencks Act, the contents of IRS Special Agent Hollingsworth's case file after Hollingsworth's testimony at trial, without at least inspecting the file *in camera* to determine whether it contained any Jencks material. Agent Hollingsworth's written case reports are not his "statements" under 18 U.S.C. §3500(e), and the trial court was under no obligation to examine the file *in camera*, since there was "no basis for belief that a Jencks Act 'statement' existed other than those already furnished defense counsel."

In the present case, as stated above in this subsection, although there possibly is a brief Jencks Act "statement" in complainant's investigation report relating to the invoices, bank statements and other documents referred to in Mr. Cazier's direct examination,

that affords no basis for an *in camera* examination of the report since respondent was not interested in that material but, rather, wanted to see the entire report, particularly the opinions, reasoning and analyses, which are not a producible "statement."

Similarly, in *United States v. Nickell*, 552 F.2d 684, 687-90 (6th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978), in sustaining the trial judge's refusal to conduct an *in camera* examination of an FBI agent's reports, the court stated (footnote omitted):

He [appellant] asserts in effect that the Jencks Act required that on demand he be allowed to see the reports, or in the alternative that the District Judge screen the reports *in camera* to determine whether they should be turned over as "statements" under the Jencks Act. We do not find these requirements in the Jencks Act.

....
In these cases, and all of the cases relied upon by appellant, there has, however, been some foundation laid for production of the material sought which indicated the existence of a prior "statement" relevant to the issues at trial as to which the witness had testified....

....
... But because Agent Williams became a witness as to what Green said, appellant now seeks discovery "of anything that this witness may have ... committed to writing..." Our endorsement of this broad right would require either a wholesale turnover of FBI files to any defendant on demand or, at a minimum, that the trial judge examine for relevance and materiality all of the reports filed by any government agent who took the witness stand. The first of these alternatives would have the potentiality for placing in the hands of a person (or persons) charged with crime much confidential government information which had no bearing at all upon the issue of guilt or innocence at the trial involved. Routine judicial screening, however, would pose no such problem and might on occasion contribute to a more just result. But it surely would represent an additional substantial burden to our overburdened federal trial judges and further delay the trial of criminal cases. In the face of clear Congressional opposition to such "rummaging" of the FBI files as was expressed in the Jencks Act, and in the absence of any clear affirmative mandate from the Supreme Court, we decline appellant's invitation to adopt such a broad (and necessarily unilateral) discovery rule.

In this case an experienced District Judge found no reason to require production of the FBI reports for either turnover or screening.

The record before him disclosed no basis for belief that a Jencks Act "statement" existed other than those already furnished to defense counsel. Additionally, the District Judge had before him no showing of relevance or materiality of any evidence contained in Agent Williams' "reports." . . .

We therefore hold that where the District Judge has discovered no foundation for either turnover or judicial screening of FBI files, and the appellate record discloses none except the unsupported demand of the defendant, the District Judge's refusal to order either turnover or screening is not an abuse of judicial discretion.

As stated above in this subsection in the comments following the quotation from the *Dark* case, although complainant's investigation report possibly includes a brief Jencks Act statement relating to the invoices, bank statements, and other documents referred to in Mr. Czaier's direct examination, that affords no basis for an *in camera* examination of the entire investigation report in view of the fatal defects in respondent's position, discussed above.

For the reasons set forth above, there is no basis for an *in camera* examination of complainant's investigation report in the circumstances of this case.

**VI. Complainant's Investigation Report Is Not
Producible in Whole or in Part under the
Brady Doctrine, and an In Camera Examination
Is Not Appropriate.**

It is explained in subsection A of this section why the *Brady* doctrine should not be applied in administrative proceedings under the Packers and Stockyards Act. However, even if *Brady* is fully applicable in such proceedings, it is explained in subsection B of this section why complainant's investigation report is not producible in whole or in part under *Brady*, and an *in camera* examination is not appropriate.

**A. The Brady Doctrine Should Not Be Applied
in Administrative Proceedings under the
Packers and Stockyards Act.**

The extent, if any, to which the *Brady* doctrine is applicable to administrative proceedings is not settled. In *Gilbert v. Johnson*, 19 F. Supp. 859, 868-78 (N.D. Ga. 1976), *aff'd in part, rev'd in*

part, and remanded, 601 F.2d 761 (5th Cir. 1979), cert. denied, 445 U.S. 961 (1980), the court held (i) that the *Brady* doctrine does not apply in full in an administrative disciplinary proceeding to determine the fitness of a Veterans Administration physician to remain in his position as Associate Chief of Staff at a Veterans Administration Hospital, (ii) that there was no violation of due process when the Veterans Administration failed to turn over exculpatory evidence to the physician, and (iii) that the administrative Disciplinary Board had no duty to review the agency's investigative report to determine if it contained exculpatory evidence.

As to the first point, although the district court recognized that judicial review extended to determine whether the physician was "afforded administrative procedural due process as provided by statute, regulation and the United States Constitution" (*id.* at 868), the court held (*id.* at 877):

Nowhere is there stated a constitutional requirement, which the plaintiff urges, that the pre-hearing discovery and disclosure procedures be available to a government employee challenging an adverse personnel decision in an administrative hearing.

The cases cited by plaintiff are not persuasive. *Brady v. Maryland*, *supra*; *United States v. Ladd*, *supra*, and *United States v. Graves*, *supra*, are all criminal cases wherein the full panoply of due process rights has long been assured and guarded by the Fifth Amendment and the courts. It is axiomatic that the procedural due process prerequisites in a criminal trial are not applicable in full to an administrative hearing.

As to the second and third points, the physician set forth a strong basis for his contention that the Veterans Administration investigation reports contained interview reports of persons (not called as witnesses by the Veterans Administration) which provided material exculpatory evidence (*id.* at 875), but the district court held, *inter alia* (*id.* at 878):

The Court fails to see how plaintiff's other objections that exculpatory witnesses were not disclosed to him or that the Board's failure to review the preliminary investigation reports for exculpatory evidence raise cognizable due process violations, considering the foregoing discussion of the due process requirements of a §4110 hearing. They are therefore overruled.

On appeal from that decision, the court of appeals affirmed in all respects, except for an issue relating to the right of the physician's attorney to intervene (after his discharge) to protect his interest:

for a fee. *Gilbert v. Johnson*, 601 F.2d 761, 762-67 (5th Cir. 1979), cert. denied, 445 U.S. 961 (1980). Specifically, the court held (*id.* at 762, 766):

[T]he [district] court correctly noted that in this Circuit judicial review of federal employee personnel decisions is limited to a determination of (1) whether the employee has been afforded administrative procedural due process as provided by statute, regulations and the Constitution; and (2) whether the decision was arbitrary or capricious.

...
... The [district] court dealt in detail with each of the many contentions made by the plaintiff under the due process challenge. We have carefully considered each of these and approve the action taken by the trial court. In sum, we are satisfied that ... the hearing was conducted properly, and the decision accorded completely with the standards of due process.

Similarly, the Federal Trade Commission, in holding that its discovery rules do not give respondents the right to production of all interview reports of persons interviewed by the Commission in connection with an administrative proceeding, stated that the *Brady* doctrine is "inapposite to Commission proceedings." *In re Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969). The Commission stated (*ibid.*):

Respondents assert that the Commission's staff has engaged in what is described as a far-reaching investigation covering a period of more than one year and that in that period, both before and after the issuance of the complaint, thirty-nine persons were interviewed, of which complaint counsel indicated an intention to call only eleven. Complaint counsel will not reveal, it is claimed, what they have learned from any of the persons interviewed. Respondents argue that they "cannot hope to retrace complaint counsel's steps." The reasons they assert are that the hearing date set for February 3, 1969, does not allow sufficient time and, furthermore, that they have "every reason to believe that the interviewees will not prove cooperative." Thus, they argue that in the circumstances it would be unfair and a denial of due process to permit the hearing to proceed without requiring complaint counsel to divulge materials favorable to respondents' case or casting doubt on the complaint counsel's case.

As legal authority for their contention that they are entitled to interview reports as a part of prehearing discovery, the re-

spondents cite the cases of *Giles v. Maryland*, 386 U.S. 66 (1967); and *Brady v. Maryland*, 373 U.S. 83 (1963). These cases, in our view, are inapposite to Commission proceedings. Both involve the suppression of evidence where the defendants were found guilty of crimes for which they had been sentenced to death (commuted to life in the *Giles* case). The holdings in such cases, on vastly different factual circumstances, have little, if any, direct relevance to administrative proceedings.

On the other hand, in *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 140-45 (S.D.N.Y. 1966), the court, although denying a motion for a preliminary injunction to enjoin a Federal Trade Commission hearing because the Commission had not granted respondent's request for discovery of all agency investigation files as to respondent, indicated that *Brady* is "presumably" applicable "where consistent with the public interest" (*id.* at 142). The court stated (*ibid.*):

There is no question that due process requires the prosecution in a criminal case to disclose evidence in its possession which may be helpful to the accused. E.g., *Brady v. State of Maryland*, 373 U.S. 83, 88 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2 Cir. 1964). Presumably, the essentials of due process at the administrative level require similar disclosures by the agency where consistent with the public interest.

Similarly, the Securities and Exchange Commission has "conceded the necessity of disgorging any *Brady* materials" in an administrative proceeding. *Connors v. SEC*, Fed. Sec. L. Rep. (CCH) ¶ 96,871A, at 95,560 (D.D.C. May 18, 1979) (No. 79-1341).

My own experience in connection with Packers and Stockyards Act administrative proceedings during a period of more than 30 years leads me to conclude that the *Brady* doctrine should not be held applicable to such proceedings. *Brady v. Maryland*, 373 U.S. 83, 84-88 (1963), is a criminal case in which it was held to be a violation of due process for the prosecution to suppress evidence that an accomplice committed the actual homicide involved in the case. In view of the great dissimilarities between criminal cases and administrative proceedings under the Packers and Stockyards Act, there is no justification for applying the *Brady* doctrine to Packers and Stockyards Act administrative proceedings.

The types of issues involved in Packers and Stockyards Act administrative proceedings are generally not similar to the types of issues involved in criminal cases. In many criminal cases, you know

that what was done was illegal, but the issue is, "who did it?" In Packers and Stockyards Act administrative proceedings, on the other hand, you almost always know "who did it," but the issue is, "was it unlawful?" Furthermore, criminal cases are frequently *malum in se*; Packers and Stockyards Act administrative proceedings are usually *malum prohibitum*.

In many criminal cases, the witnesses are unsavory. Some testify against an accomplice in exchange for leniency. But in Packers and Stockyards Act administrative proceedings, the witnesses are generally reputable citizens. And there is no practice of giving lenient treatment in exchange for testimony against accomplices.

In criminal cases, prosecutors may feel some pressure because newspapers have reported that a crime has been committed and that the defendant has been arrested in connection with the crime. In Packers and Stockyards Act administrative proceedings, the public rarely, if ever, knows that an allegedly unlawful act has been committed until the agency files a complaint.

In a criminal case, a single attorney frequently institutes the case or has the case presented to a grand jury, without review by a supervisor. In a typical Packers and Stockyards Act administrative proceeding, on the other hand, a regional investigator's report is reviewed by (i) a specialist in the Regional Office, (ii) the Regional Supervisor, (iii) an employee in the agency's Washington Branch, (iv) the Washington Branch Chief, (v) the Washington Division Director, (vi) the Deputy Administrator of the Packers and Stockyards Administration, (vii) an attorney in the Office of the General Counsel, (viii) the Assistant General Counsel, and (ix) the Administrator of the Packers and Stockyards Administration. The nine-layer administrative review involves three separate offices, the Packers and Stockyards Regional Office, the Packers and Stockyards Washington office, and the Office of the General Counsel. *See Campbell, "The Packers and Stockyards Act Regulatory Program,"* in 1 Davidson, *Agricultural Law*, §3.20 (1988 Supp.).

At the Washington level of the Packers and Stockyards Administration, the pressure is to settle a case by a warning letter or stipulation, where appropriate, in view of the large number of investigations conducted by the 12 Regional Offices. Moreover, since the Office of the General Counsel is not supervised in any manner by the same persons who supervise the administrative employees, the attorneys are free to take a completely independent look at the matter. They prepare a formal complaint only in those case where they conclude that the evidence establishes a violation.

There is significantly more stigma attached to a criminal conviction than an administrative order. And a criminal conviction can result in loss of life, liberty, or citizenship rights, while an administrative order, even though severe, cannot result in such losses.

In a criminal case, it is not unusual for the Government to have *Brady* material in its possession. But in a Packers and Stockyards Act administrative proceeding, the Government never, or almost never, has *Brady* material in its possession. If it did, it would likely be a statement producible under the Jencks Act.

Generally, the only type of material in a Packers and Stockyards Act investigation report that would be helpful to a respondent in defending against a particular complaint (that would not be producible under the Jencks Act) would be in the nature of legal reasoning (which, as shown in subsection B below is not producible under *Brady*), or interview reports of persons who expressed satisfaction with respondent's conduct. This latter type of material is exculpatory (and, therefore, would not be producible under *Brady*) since it has not been regarded as persuasive in respondent's favor. See, e.g., *In re Bosma*, 41 Agric. Dec. 1742, 1754 (1982), as amended, docketed, No. 83-7069 (9th Cir. Feb. 2, 1983). The fact that farmers were satisfied with the manner in which a stockyard operator handled their livestock "does not negate a violation of the Act and regulations." *Ibid.*

Since (i) there are so many striking differences between criminal cases and administrative proceedings under the Packers and Stockyards Act, and (ii) application of the *Brady* doctrine would not produce any substantial benefit to respondents in Packers and Stockyards Act administrative proceedings, the *Brady* doctrine will not be applied in such proceedings by the Judicial Officer in the absence of a judicial mandate.

B. Assuming the Full Applicability of the Brady Doctrine Here, Complainant's Investigation Report Is Not Producing in Whole or in Part, and an In Camera Examination Is Not Appropriate.

Assuming that the *Brady* doctrine is fully applicable to administrative proceedings under the Packers and Stockyards Act, if complainant's investigation report is not producible in whole or in part and an *in camera* examination of the investigation report is not appropriate, under the *Brady* doctrine, in the circumstances of this case.

Unlike the Jencks Act, the *Brady* doctrine is self-executory. That is, the Government is under a duty, even in the absence of a ruling, (*United States v. Wilkins*, 326 F.2d 135, 137-40 (2d Cir.

United States v. Leta, 60 F.R.D. 127, 129 (M.D. Pa. 1973)), to turn over to the defendant material evidence that would exculpate the defendant or impeach a Government witness in a way that might affect the outcome of the trial, either as to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 84-88 (1963); *United States v. Di Francesco*, 604 F.2d 769, 773-74 (2d Cir. 1979), *rev'd on other grounds*, 449 U.S. 117 (1980).

However, as in the case of the Jencks Act, the *Brady* doctrine does not apply to legal reasoning. *United States v. White*, 671 F.2d 1126, 1133 (8th Cir. 1982). In the case just cited, the court held (*ibid.*):

We also reject appellants' argument that the court's action violated the rule of *Brady v. Maryland*, *supra*. *Brady* requires the prosecution to produce "evidence favorable to an accused * * * where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, *supra*, 373 U.S. at 87, 83 S.Ct. at 1196-97. An intra-agency legal opinion does not constitute such evidence.

In the present case, respondent is primarily seeking the legal opinion of complainant's auditor as to why he did not recommend an action against respondent's Turlock Livestock Auction Yard, and the legal opinion of the person who did recommend such action. There is no basis under the *Brady* doctrine for ordering the production of such material.

In addition, respondent is seeking the production of material prepared by a Government witness, which falls within the general orbit of the Jencks Act. Accordingly, since the material is not producible under the Jencks Act (§ V, *supra*), that should be decisive of the issue under *Brady* as well. *Cf. United States v. Jones*, 612 F.2d 453, 455 (9th Cir.), *cert. denied*, 445 U.S. 966 (1980), in which the court held that the Jencks Act was controlling over *Brady* as to the time when material must be turned over to a defendant, stating:

Brady does not overcome the strictures of the Jencks Act. When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control. *United States v. Kaplan*, 554 F.2d 577 (3d Cir. 1977); *United States v. Scott*, 524 F.2d 465 (5th Cir. 1975).

In addition, in *Palermo v. United States*, 360 U.S. 343, 351 (1959), the Court stated:

The purpose of the [Jencks] Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government

which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all.

Although the Court in *Palermo*, in the quotation set forth immediately above, did not have before it a *Brady* issue, it would seem appropriate to apply the Court's language to a *Brady* issue as well as to any other issue. That is, if a defendant seeks the production of a statement of a Government witness which is generally within the orbit of the Jencks Act, 18 U.S.C. §3500, if it cannot be produced under the terms of the Jencks Act, it cannot be produced at all (even under *Brady*).

Where there is a basis for believing that the Government possesses *Brady* material, it is appropriate for the trial court to examine the material *in camera*, excising non-*Brady* material. *United States v. Jones*, 612 F.2d 453, 455-56 (9th Cir.), cert. denied, 445 U.S. 966 (1980); *United States v. Gaston*, 608 F.2d 607, 613 (5th Cir. 1979); *United States v. Leta*, 60 F.R.D. 127, 130 (M.D. Pa. 1973).

However, where the defendant makes a "blanket request for favorable material in the government's file," it is proper for the court to rely on the Government's assurances that it is not in possession of *Brady* material, without making an *in camera* examination of the Government's file. *United States v. Gaston*, 608 F.2d 607, 612 (5th Cir. 1979); accord, *United States v. Gonzalez*, 466 F.2d 1286, 1288 (5th Cir. 1972); *United States v. Frazier*, 394 F.2d 258, 261-62 (4th Cir.), cert. denied, 393 U.S. 984 (1968); *United States v. Hall*, 424 F. Supp. 508, 515 (W.D. Okla. 1975), aff'd, 536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States v. Leta*, 60 F.R.D. 127, 129-30 (M.D. Pa. 1973); and see *United States v. White*, 671 F.2d 1126, 1132-33 (8th Cir. 1982).

Where the Government says that it has no exculpatory evidence, *Brady* "does not make it incumbent upon the trial judge to rummage through the [Government's] file on behalf of the defendant." *United States v. Frazier*, 394 F.2d 258, 261-62 (4th Cir.), cert. denied, 393 U.S. 984 (1968).

In *United States v. Gonzalez*, 466 F.2d 1286, 1288 (5th Cir. 1972), the court, in sustaining the trial court's refusal to conduct an *in camera* inspection of the Government's file, stated:

For similar reasons we find no prejudice in the court's refusal to conduct an *in camera* inspection of the government's file to locate material favorable to the defendant.... At the trial the prosecutor and the FBI agent in charge of the case stated they were not aware of any information favorable to the defendant.

The government's denial that it possessed any undisclosed exculpatory evidence was ample justification for the trial judge's refusal to make an in camera inspection of the government's file, given the absence of any particularized showing by the defendant of materiality or usefulness. See *United States v. Evanchik*, 2 Cir. 1969, 413 F.2d 950, 953.

The court similarly held in *United States v. Leta*, 60 F.R.D. 127, 129-30 (M.D. Pa. 1973):

In a situation such as the one at bar where the defendant has requested the disclosure of exculpatory material and the Government has denied that it possesses any, there are three possibilities: (1) permit defendant to examine the Government case file for exculpatory material; (2) order production of the Government's file for an in camera inspection by the Court to ascertain whether any of the material is favorable to the defendant; (3) rely upon the good faith of the prosecution in its representation that it possesses no exculpatory material. The first possibility would effectively open the Government's file to defendants in every criminal case. Whatever might be the merits of such a contingency, it is clearly beyond the scope of discovery as now provided in F.R.Crim.P. 16. The second possibility would place an unmanageable burden upon the Court. In my view, therefore, the Court, when considering a motion for pre-trial disclosure of exculpatory material, must rely upon the Government's assertions that it possesses no such material. However, if during trial evidence is introduced which indicates that the prosecution may possess or be aware of evidence favorable to the defendant, the Court, upon motion by the defendant, will make an in camera inspection of the Government's file or take whatever action is necessary under the circumstances. If it is determined that the Government has failed to disclose obviously exculpatory material, the Court may impose whatever sanctions are appropriate, including dismissal of the charges or a declaration of mistrial. If it is determined that the prosecution possesses or is aware of evidence arguably exculpatory in nature, the Court will make an independent determination as to whether in fact the material is favorable to defendant, and if it is, will order that it be disclosed to defendant at that time. Any doubt as to the exculpatory nature of the material will be resolved in favor of disclosure.

In the present case, complainant's counsel has repeatedly stated that complainant possesses no exculpatory evidence. Even if legal

reasoning or analyses were producible under the *Brady* doctrine (which, as shown above, is not the case), complainant's attorney states that the investigation report is completely silent as to complainant's witness did not recommend a proceeding against respondent's Turlock Livestock Auction Yard. There is no reasonable doubt complainant's counsel in this respect.

Respondent has suggested no other types of material in the investigation report that might be useful or helpful in defending against this administrative complaint. And there is no basis for inferring that any such material exists. It is reasonable to believe that the evidence relating to the livestock transactions involved in this case has been produced. The participants in the livestock transactions were respondents Cozzi and Machado, on the one hand, James Delfino, d/b/a Imperial Cattle Company, on the other hand. Both respondent Cozzi and Mr. Delfino testified as to the transactions. Massive exhibits were received in evidence relating to the transactions. There is no basis for believing that any other material producible under the *Brady* doctrine is in existence. Accordingly, there is no basis for an *in camera* examination of complainant's investigation report.

Where there is a basis for an *in camera* examination, as in the case of the Jencks Act, the trial judge should make it clear that after examination and excision, he or she will merely direct that material be delivered to the defendant. That will preserve the important rights to the complainant discussed above in section IV. Such procedure was indicated in *United States v. Leta*, 60 F.R.D. 1130 (M.D. Pa. 1973).

VII Order To Be Issued

For the foregoing reasons, the initial decision dismissing the complaint should be vacated and the proceeding should be remanded to the trial judge for the preparation of an initial decision based on the evidence in this case.

In the circumstances of this case, complainant's refusal to furnish the investigation report under Judge Palmer's rulings does not give rise to an inference that there is evidence favorable to respondent in the investigation report since complainant was understandably concerned with establishing a damaging and erroneous precedent in his case.

When the remand order was originally filed in this case on May 1983, it provided for an *in camera* examination of complainant's investigation report by Judge Palmer after the issuance of his decision, with the results sealed with the investigation report. The

procedure was ordered so that *if* the final administrative decision is against respondent, and a reviewing court disagrees with the Judicial Officer's conclusions with respect to the investigation report, the court could consider the investigation report without a remand to this agency.

On further consideration, however, I do not believe that the investigation report should be examined *in camera*, even after the issuance of the initial decision. The procedural issues involved in this case are far more important to this Department than the case itself. Accordingly, no action should be taken that might preclude the filing of a petition for a writ of certiorari in the event of an adverse decision as to these procedural issues.¹³ Complainant should, however, preserve the investigation report until this litigation is ultimately concluded.

ORDER

The order filed December 30, 1982, dismissing the complaint in this proceeding is hereby vacated and the proceeding is remanded to the Administrative Law Judge for the preparation of an initial decision based on the evidence in the record and any reasonable inferences drawn from the record. No inference is to be drawn that complainant's investigation report contains materials which would exculpate respondent. Complainant shall preserve the investigation report involved in this proceeding until this litigation is ultimately concluded. This proceeding should be expedited insofar as practicable.

(No. 22,562)

In re: JERRY HUNT. P&S Docket No. 6121. Decided June 27, 1983.

Dealer—Insufficient funds checks—Failing to pay and failing to pay when due—Suspension of registration—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from issuing insufficient funds checks in payment for livestock, failing to pay when due and failing to pay the full purchase price of livestock. **Respondent** was suspended as a registrant under the Act for 21 days.

¹³ A petition for certiorari could not be filed if the court disagreed with the decision as to the procedural issues, but affirmed a decision against respondent, holding that the procedural error was harmless since the investigation report contains no material that should have been produced under *Brady*, the Jencks Act, or the Department's policy. (This is not, of course, to be construed as suggesting that the administrative decision on the merits will be against respondent.)

Barbara Harris, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jerry Hunt, d/b/a Sandhill Livestock Co., hereinafter referred to as respondent, is an individual whose mailing address is P.O. Box 417, Lakefield, Minnesota 56150.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, directly or indirectly, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for twenty one (21) days.

The provisions of this Order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,563)

In re: SERV-U MEAT PACKING COMPANY. P&S Docket No. 6109.
Decided June 30, 1983.

Packer—Final payment based on other than actual hot carcass weights—Recording inaccurate weights—Inaccurate weighing—Maintaining and operating livestock or monorail scales—Operating monorail scales unless hooks, rollers and gambrels are of uniform weight—Using a tare greater than actual—Operating monorail scale only with properly adjusted tare—Payment based on incorrect weights—Collecting from purchasers based on incorrect weights—Failing to disclose details of purchase contract—Maintain accounts and records which disclose true nature of transactions—Copies of decision and order to be delivered to certain employees—Consent

Respondent consented to the entry of this decision and order in which it was ordered to cease and desist from failing to make final payment for livestock based on actual hot carcass weights; recording incorrect weights on documents or records which purports to show hot or cold weights of livestock carcasses; weighing livestock or livestock carcasses at other than true and correct weights; failing to maintain and operate livestock or monorail scales as to insure accurate weights; operating any monorail scale unless the hooks, rollers and gambrels are of uniform weight; using a tare which is greater than the actual weight of hooks, rollers and gambrels; operating any monorail scale unless the tare on such scale has been checked and properly adjusted prior to the start of each day's operations and as often as necessary during each day's operations to insure that the tare is proper; paying sellers of livestock on the basis of incorrect weights; collecting from purchasers of livestock carcasses based on incorrect weights; and failing to disclose in writing to the sellers of livestock on a carcass weight basis complete details of the purchase contract. Respondent was ordered to keep and maintain accounts, records and memoranda which fully disclose the true nature of all transactions involved in its operations subject to the Act. Respondent was also ordered to deliver a copy of this decision and order to various employees.

Jory Hochberg, for complainant.

Henry Himmelfarb, Los Angeles, California, for respondent.

2. Recording or causing to be recorded inaccurate or incorrect hot or cold weights on shipping documents, cold weight manifests, accountings and invoices, or any other document or record which purports to show the hot or cold weights of livestock carcasses or parts thereof in transactions in which the livestock carcasses or parts thereof are being purchased or sold on the basis of the hot or cold weights;

3. Weighing livestock, livestock carcasses or parts thereof, or causing them to be weighed, at other than the true and correct weights;

4. Failing to maintain and operate any livestock or monorail scale owned or controlled by them in such a manner as to insure accurate and correct weights;

5. Operating any monorail scale owned or controlled by them which is being used in connection with the weighing of livestock purchased on a carcass weight or carcass grade and weight basis unless the hooks, rollers, gambrels or other similar equipment used in connection with the weighing of carcasses of the same species of livestock are of uniform weight;

6. Using a tare when weighing livestock carcasses, purchased on either a carcass weight or carcass grade and weight basis by respondent or by customers for whom respondent is custom killing livestock, which is greater than the actual weight of the hooks, rollers, gambrels or other similar equipment used in connection with such weighing, or otherwise failing to comply with the provisions of section 201.99 of the regulations promulgated under the Packers and Stockyards Act (9 C.F.R. §201.99);

7. Operating any monorail scale owned or controlled by them for weighing livestock carcasses purchased on a carcass weight or carcass grade and weight basis unless the tare on such scale has been checked and the scale's tare has been correctly and properly adjusted prior to the start of each day's operations, and as often as necessary during each day's operations to insure that the tare is proper;

8. Accounting to and paying the sellers of livestock on the basis of inaccurate or incorrect weights;

9. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of inaccurate or incorrect weights; and

10. Failing to disclose in writing to the sellers of livestock on a carcass weight or carcass grade and weight basis, prior to the respondent's purchase of such livestock, complete and accurate details of the purchase contract, including the expected date and place of slaughter, carcass price, condemnation terms, description of carcass trim, and the grading to be used.

Respondent Serv-U Meat Packing Company shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including cold weight manifests, accounts of sale and purchase invoices showing the true and accurate hot weights of livestock purchased on a carcass weight basis, and the true and accurate cold weights of all livestock carcasses or parts thereof sold on a weight basis.

Respondent Serv-U Meat Packing Company shall deliver a copy of this Decision and Order to all of its personnel whose duties or responsibilities include, in whole or in part, the operation of its livestock and monorail scales, the weighing of livestock or livestock carcasses (hot and cold weighing), the accounting to and payment of the sellers of livestock, and the billing and invoicing to purchasers of livestock carcasses or parts thereof.

The provisions of this order shall become effective on the first day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

REPARATION DECISIONS

(No. 22,564)

GENERAL INDUSTRIES, INC. v. DELWYN ELLIS, BLACKFOOT LIVESTOCK COMMISSION CO., H.M. "MOE" SAGERS, and BILL LOGAN. P&S Docket No. 6033. Decided June 30, 1983.

Dealer—Misrepresentation—Fraud—Unjust practice—Reparation awarded

Respondent Sagers intentionally misrepresented to respondent Logan that he had a buyer for the cattle but it is concluded that he did not have a buyer. Respondent Sagers intentionally misrepresented to Mr. Logan that Blackfoot Livestock Commission Co. had agreed to buy the cattle if Mr. Sagers' "buyer" did not purchase them. Respondent Sagers intentionally misrepresented to Mr. Logan the terms of his agreement with the sellers of the cattle, particularly the price per head and the total amount of the down payment. These misrepresentations were made with the intention that they be communicated to and relied upon by whomever was to furnish the down payment, that they were made before complainant expended the funds and that that expenditure was made in reliance upon such misrepresentations. It is concluded that the evidence shows a fraud by Mr. Sagers on the complainant. Respondent Sagers was ordered to pay the sum of \$110,000.00 plus interest thereon to complainant and respondents Blackfoot Livestock Commission Co., and Bill Logan. The complaint was dismissed as to respondents Ellis, Blackfoot and Logan, and all cross-claims were dismissed.

John J. Casey, Presiding Officer.

Robert S. Lynch, Phoenix, Arizona, for complainant.

Dwight E. Baker, Idaho Falls, Idaho, for respondents Ellis and Blackfoot

Nick Knez, Tucson, Arizona, and *Robert M. Cook*, Norfolk, Nebraska, for respondent Logan.

Respondent Sagers, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), begun by a complaint received on July 30, 1981, alleging in substance and expenditure in reliance on fraudulent misrepresentations. The amount claimed was \$110,000.00.

Copies of the complaint, the exhibits thereto, and an investigation report prepared by the Packers and Stockyards Administration of this Department, were served on respondents Ellis and Blackfoot on February 9, 1982, on respondent Sagers on February 8, 1982,

and on respondent Logan on February 19, 1982. A copy of the investigation report was served on complainant on February 8, 1982.

Respondents Ellis and Blackfoot timely filed an answer, and later a supplemental answer and cross-claim against respondents Sagers and Logan. Respondent Sagers timely filed an answer and later a cross-claim against respondent Logan. Respondent Logan timely filed an answer and cross-claim against respondents Ellis, Blackfoot, and Sagers, and later a supplemental answer. Respondent Sagers filed answers to the cross-claims of respondents Ellis, Blackfoot and Logan. Respondent Logan filed answers to the cross-claims of respondents Ellis, Blackfoot, and Sagers. Complainant filed replies to all answers. Each cross-claim was for whatever amount the respective cross-claimant might be ordered to pay the complainant.

An oral hearing was requested, and was held on November 30, December 1, and December 2, 1982 in Phoenix, Arizona before John J. Casey of the Office of the General Counsel of this Department. Complainant was represented by Robert S. Lynch, Esq., Phoenix. Respondents Ellis and Blackfoot were represented by Dwight E. Baker, Esq., Idaho Falls, Idaho. Respondent Logan was represented by Nick Knez, Esq., Tucson, Arizona and Robert M. Cook, Esq., Norfolk, Nebraska. Respondent Sagers did not appear at the hearing in person or by counsel or other representative. Seven witnesses testified. Eighteen exhibits, consisting of 75 pages, were received. Thereafter complainant filed a brief.

FINDINGS OF FACT

1. Complainant General Industries, Inc. at all times material herein was a corporation with its principal place of business in Maricopa County, Arizona.

2. Respondent Delwyn Ellis at all times material herein was President of respondent Blackfoot Livestock Commission Co.

3. Respondent Blackfoot Livestock Commission Co. at all times material herein was a corporation with its principal place of business in Blackfoot, Idaho, and engaged in business as a market agency buying and selling livestock on commission, and as a dealer buying and selling livestock for its own account, in commerce, and so registered with the Secretary under the Act.

4. Respondent H.M. "Moe" Sagers at all times material herein was a resident of Heyburn, Idaho, and engaged in business as a dealer buying and selling livestock for his own account in commerce.

5. Respondent Bill Logan at all times material herein was a resident of Benson, Arizona.

6. On or about March 19, 1981, complainant expended \$110,000.00 as a down payment on certain cattle, to be bought and resold, the profit if any on the resale to be split, one-third to complainant, one-third to respondent Logan, and one-third to respondent Sagers, in reliance upon misrepresentations of respondent Sagers that he had an agreement with the seller to buy them at \$605.00 per head for the cows, natural increase (calves) to go with their mothers, that the \$110,000.00 was to be paid to the seller as a down payment, that he (Sagers) knew of a person who would buy them, and that respondent Blackfoot Livestock Commission Co. would buy them if the other person defaulted.

7. In fact respondent Sagers' agreement with the seller was for a price of \$583.00 per head for the cows, the down payment to the seller was \$70,000.00, no buyer materialized, and respondent Blackfoot Livestock Commission Co. had never agreed to do any such thing. The seller retained the \$70,000.00 down payment because delivery was not taken as promised in its agreement with respondent Sagers.

8. Complainant has received no part of the \$110,000.00 and no value in return for it, except upon settlement with respondents Ellis, Blackfoot and Logan.

9. The initial complaint was received within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

In this case, clarity requires a brief identification of the persons involved in the case including some who are not parties:

Victorio Land & Cattle Co. (Victorio): owner of the Little Boquillas Ranch and seller of the cattle in dispute.

Lee Wright: President of Victorio.

Harvey Dietrich: Vice-President of Victorio in 1981.

Jay Moyes: Vice-President and General Counsel of Victorio in 1981.

Collis Brown and Neely McCartney: when Mr. Wright decided to sell the cattle, Mr. Dietrich contacted Mr. Brown, who contacted Mr. McCartney, who contacted Mr. Sagers; Mr. Brown also contacted Mr. Logan; the day after Mr. McCartney introduced Messrs. Sagers and Brown, Mr. Brown introduced Messrs. Sagers and Logan.

Respondent Bill Logan: received a proposition from Mr. Sagers and relayed it to Mr. Holdcroft, to purchase and resell the Victorio cattle.

Howard "Hod" Holdcroft: President of General Industries, Inc.

Complainant General Industries, Inc.: paid \$110,000.00 to Blackfoot.

Respondent Blackfoot Livestock Commission Co. (Blackfoot): received \$110,000.00 from General Industries; paid \$100,000.00 to Mr. Sagers.

Respondent Delwyn Ellis: President of Blackfoot.

Respondent H.M. "Moe" Sagers: entered into an agreement with Victorio to buy the cattle, received \$100,000.00 from Blackfoot, and paid \$70,000.00 to Victorio.

In early 1981, Lee Wright, President of Victorio, decided to sell the entire herd of cattle, approximately 1400 head, then on its Little Boquillas Ranch in Arizona. Harvey Dietrich, then Vice-President of Victorio, informed a few people in the cattle business whom he knew including Collis Brown. Mr. Brown went to see the cattle so that he could describe them to others. Mr. Brown contacted Neely McCartney whom he knew and described the cattle to him. Mr. McCartney suggested H.M. "Moe" Sagers, whom he knew, as a person who might be interested. On Wednesday, February 25, Messrs. Brown, McCartney and Sagers met in Benson, Arizona. Messrs. Brown and Sagers had never met before. (testimony of Mr. Wright at Tr. 260 *et seq.*, Mr. Dietrich at Tr. 155 *et seq.*, and Mr. Brown at Tr. 134 *et seq.*)

Mr. Brown also contacted Bill Logan, whom he knew, about the cattle, and Mr. Logan said he might be interested. Mr. Brown testified that Mr. Sagers told him (Brown) that he had a buyer in Texas for the cattle, and that he (Brown) told Mr. Logan:

I told him that Moe Sagers was on the deal and Moe was waiting on some men and I didn't want to interfere with the—he could talk to Moe about it or I'd tell Moe about Bill [Logan] and after he had—the men from Texas—given them their chance, then, you know, they could do whatever they wanted to after the other guys passed, if they passed.

On Thursday, February 26, at an auction in Tucson, Mr. Brown introduced Messrs. Logan and Sagers but there was no discussion of the Victorio cattle. Messrs. Brown and Sagers had met for the first time the day before that; Messrs. Logan and Sagers had never met before. (testimony of Mr. Brown at Tr 136 *et seq.*, Mr. Logan at Tr. 23 *et seq.*, 55 *et seq.*)

On Friday, February 27, a meeting took place at the Little Boquillas Ranch, of Messrs. Wright, Dietrich, Brown, McCartney

and Sagers. Although he had been told about the cattle, Mr. Logan was not present at that meeting. Mr. Brown testified:

Mr. Sagers said he had a buyer for the cattle and he called them in Texas and they were supposed to show up that Friday, which they never did. This was on a Wednesday [referring to his first meeting with Mr. Sagers] and I met Moe back in Tucson on Thursday night and was with him Friday. He was waiting for these men to show up, but they never did show up.

(testimony of Mr. Wright at Tr. 261, Mr. Dietrich at Tr. 156, and Mr. Brown at Tr. 136)

On a Friday, sale day at respondent Blackfoot's auction, the record does not show which Friday, Mr. Sagers first discussed the Victorio cattle with Delwyn Ellis, President of Blackfoot. Mr. Sagers wanted Mr. Ellis or Blackfoot to "partner with him" on the cattle, but Mr. Ellis did not want to do that, having had some recent less-than-satisfactory dealings with Mr. Sagers. (Ellis testimony at Tr. 444 *et seq.*)

About Friday or Saturday, March 6 or 7, Mr. Sagers phoned Mr. Logan, "looking for somebody to go in as a partner." Mr. Logan then contacted Howard Holdcroft, President of complainant General Industries, Inc. (Logan testimony at Tr. 23 *et seq.*) Mr. Holdcroft testified (Tr. 356 *et seq.*) that Mr. Logan first proposed that General Industries purchase the Victorio cattle, but General Industries could not do this, being between the sale of one ranch, the Yolo, and the purchase of another, the Double A. Mr. Logan testified (Tr. 124) that "there was nothing ever said about buying the herd."

Sometime after the above-mentioned conversation between Messrs. Sagers and Ellis, there was another conversation between them about the Victorio cattle in which Mr. Sagers said that "he had a place to sell them" but he needed a "sizable down payment to tie the cattle up." Mr. Sagers offered \$10,000.00 if Blackfoot would put up a down payment of \$100,000.00. Mr. Ellis testified:

Well, he [Sagers] told me that I'd be required to have the money sitting at his bank in Utah, and that my money would be coming from fellows here in Arizona * * * *

Mr. Ellis, being dubious about Mr. Sagers as a result of earlier dealings with him, and being unfamiliar with Victorio, flew to Phoenix and went to the Victorio office there with Mr. Sagers. The record does not show the date but it was before the issuance of a \$100,000.00 Blackfoot draft mentioned below, dated Tuesday, March 10. They spent 20-30 minutes there. They talked with

Messrs. Wright and Dietrich, and briefly met Jay Moyes. Mr. Ellis testified:

I came to Arizona to meet the fellow that owned the cattle, to find out if the cattle were there, to find out if the cattle were for sale, to find out if they were for sale to Moe, and I met Victorio's men. Harvey was there. Lee was there * * * I shook hands with Jay and talked to him a minute. I mainly asked Lee if the cattle were for sale, if Moe had a deal on them, and he assured me if Moe came up with the down payment * * * Anyway, Mr. Wright assured me that the cattle were there, the cattle were for sale, the cattle were the right—well, if they're second calf cows, they're the best you can get. * * * I thought Moe assured me he had buyers for the cattle, and later that afternoon he had conversations with Mr. Logan.

Later that day, in a phone call from a motel room with Mr. Ellis present but not able to hear the other party to the phone call, Mr. Sagers talked to someone whom he called "Mr. Logan" about the Victorio cattle. (Ellis testimony at Tr. 444 *et seq.*; see also testimony of Mr. Dietrich at Tr. 160 *et seq.* and Mr. Wright at Tr. 266 *et seq.*)

Sometime after the above-mentioned March 6 or 7 conversation between Messrs. Sagers and Logan, there was another conversation between them about the Victorio cattle, in which Mr. Sagers "guaranteed that he had them sold to a man in Texas," named "Bill Finchler." However he needed cash to "make the contract with Victorio." Mr. Sagers proposed to Mr. Logan a "deal" or series of transactions in which the cattle would be bought from Victorio and resold to Mr. Sagers' "Finchler" at a higher price, and the profits would be split, one-third to Mr. Sagers, one-third to Mr. Logan, and one-third to whomever Mr. Logan could find to put up the down payment. Mr. Sagers also told Mr. Logan that "if anything went wrong with the deal he and Blackfoot would come up with the final payment." Mr. Logan relayed Mr. Sagers' proposition to Mr. Holdcroft; Mr. Holdcroft testified without contradiction that Mr. Logan, in doing so, did not identify Mr. Sagers until the time came to put up the down payment. Mr. Ellis testified that neither he nor anyone else connected with Blackfoot ever even discussed such a guarantee with Mr. Sagers; much less did Blackfoot ever agree to make any such guarantee. (testimony of Mr. Logan at Tr. 23 *et seq.*, 55 *et seq.*, 77, 93 *et seq.*, Mr. Holdcraft at Tr. 356 *et seq.*, 385, and Mr. Ellis at Tr. 467-8)

Tuesday, March 10, is the date of a Blackfoot draft for \$100,000.00 payable to Mr. Sagers "upon approval of contract." Mr. Ellis mailed it to the Clearfield State Bank in Utah in accord with instructions he received from Mr. Sagers. The draft was held at that bank. (Ellis & Blackfoot exhibit 2; Ellis testimony at Tr. 456 *et seq.*)

Wednesday, March 18, is the date of a check drawn by Mr. Sagers on the Clearfield State Bank for \$70,000.00 payable to Victorio. (complainant's exhibit 2)

On Thursday, March 19, Mr. Holdcroft drew a General Industries draft for \$110,000.00 payable to Blackfoot and mailed it to Blackfoot, in accord with instructions he received from Mr. Logan, and which Mr. Logan received from Mr. Sagers. (complaint attachment C, testimony of Mr. Holdcroft at Tr. 361 *et seq.*, and of Mr. Logan at Tr. 33, 91, 93-4, and 130 *et seq.*)

On Friday, March 20, Victorio deposited Mr. Sagers' \$70,000.00 check in a production credit association or PCA. (complainant's exhibit 2)

Mr. Ellis, when he received the \$110,000.00 General Industries draft, was surprised since it showed General Industries as the purchaser of the Victorio cattle. He had never heard of General Industries and had thought the purchaser was someone named Logan. On Monday, March 23, he flew to Phoenix, went to the bank named on the draft, and exchanged it for a \$110,000.00 cashier's check (complaint attachment C). He then phoned the Clearfield State Bank which was holding the \$100,000.00 Blackfoot draft and told them to honor that draft. Someone at that bank wrote on that draft "OK to pay—3/23/81." Back in Idaho the next day, he deposited the \$110,000.00 cashier's check, thus covering the \$100,000.00 Blackfoot draft payable to Mr. Sagers and the \$10,000.00 which Mr. Sagers had promised to Blackfoot if it would issue that draft. Mr. Ellis heard nothing more about the matter until General Industries' counsel Lynch contacted him the following July. (Ellis testimony at Tr. 460 *et seq.*)

Thus General Industries paid \$110,000.00, but Victorio received \$70,000.00, as a down payment on the cattle in March. Mr. Logan testified (Tr. 110 *et seq.*) that he first learned this a couple of weeks later, as he said, "reading between the lines pretty strong" in a phone call with Mr. Wright. Mr. Holdcroft testified (Tr. 367 *et seq.*) that he first learned it on May 30 in a phone call with Mr. Dietrich. Of the difference, Blackfoot retained \$10,000 and Mr. Sagers retained \$30,000 as shown above.

Tuesday, March 24, is the date of a letter (complainant's exhibit 1) from Mr. Dietrich to Mr. Sagers acknowledging receipt of the \$70,000.00 check and transmitting a printed form "purchase contract" (complaint attachment B) for Mr. Sagers to sign and return. That form is dated March 18, bears what appear to be signatures of Mr. Dietrich and Mr. Sagers, and recites that the cows were to be delivered May 1, that a pasture charge "at the rate of \$10.00 per month" was to run from March 24, and that the "cattle will be paid for (bank transfer wire) before livestock leave the ranch." The form also shows Victorio as seller and Mr. Sagers as buyer and acknowledges receipt of \$70,000.00; there being 1400 head estimated at that time, that would amount to \$50.00 per head "down payment." It also recites, "In the event of a default under this Contract, the non-defaulting party shall be entitled to reasonable attorney's fees and other costs incurred in enforcing this Contract against the defaulting party, in addition to all other remedies at law or in equity." The form also shows the price as \$583.00 per head. Mr. Logan testified (Tr. 41) that he saw that form for the first time "sixty days later," which apparently would be sometime in May; he later testified (Tr. 423) that he saw it for the first time later than that. Mr. Holdcroft testified (Tr. 373 *et seq.*) that he saw a copy of it for the first time on July 6.

Notations written by Mr. Holdcroft on the \$110,000.00 General Industries draft to Blackfoot do not show a delivery date or pasture charge. They show Blackfoot as seller and General Industries as buyer, and show that the \$110,000.00 was a "down payment." They also show the price as \$605.00.

Complaint attachment D includes a copy of a typewritten document dated March 25, as follows:

Cattle Contract from Moe Sagers (seller) to Bill Logan (buyer)

More or less 1400 to 1450 head of bangs vaccinated cows, all coming with second calf.

All unmerchantable cows and cows weak or too thin out. (I feel there will be about 1300 head to purchase.)

Price, \$605. per head (all increase go with the cows)

Clean, legal bill of health for shipment furnished by Victoria (sic) Land and Cattle Company

Seller, Moe Sagers), will pay pasture at rate of \$10 per head per month starting March 24, 1981, (this does not include calves). This will be pro rated. The pasture charge will be added to the \$605.00 per head to Bill Logan.

Victoria (sic) Land and Cattle will continue to feed cattle the same as they did before selling them.

It is understand (sic) we can show the cows to prospective buyers.

Bill Logan has paid \$110,000.00 down. The balance will be paid with guaranteed money as cattle are shipped.

It is understood that Moe Sagers has the cattle contracted from Victoria (sic) Land and Cattle Company.

The cattle are located near Benson, Arizona in Cochise County.

s/Moe Sagers

Mr. Logan received it in the mail from Mr. Sagers; when he received it is not clear but appears to have been shortly after the date on it, March 25. He promptly phoned Mr. Sagers and told him it should have gone to Mr. Holdcroft because he put up the \$110,000.00. He also promptly phoned Mr. Holdcroft and read it to him, and Mr. Holdcroft picked it up one or two weeks later. That would be in early April. The document was never signed by anyone except Mr. Sagers. Mr. Logan testified that it differed from the agreement of himself, Mr. Sagers and Mr. Holdcroft in various respects including that it showed Mr. Logan rather than General Industries as buyer. (testimony of Mr. Logan at Tr. 34 *et seq.*, 89 *et seq.*, 103 *et seq.*, 121 *et seq.*) Notations on the \$110,000.00 General Industries draft to Blackfoot show General Industries as purchaser and the price as \$605.00. Also, Mr. Holdcroft testified (Tr. 366 *et seq.*) in substance that he thought that the \$110,000.00 draft reflected the agreement, not only among himself and Messrs. Sagers and Logan, but with Victorio too. All of this shows that what Messrs. Sagers, Logan and Holdcroft agreed was that the cattle would be bought from Victorio at \$605.00 per head and resold to General Industries at the same price, and that General Industries would resell to Mr. Sagers' "Finchler," collect the proceeds, pay the balance due to Victorio plus the expenses such as the pasture charge up to the time of delivery, and then pay Messrs. Sagers and Logan their respective one-third shares of the profit if any. So far as the record shows, they did not discuss what would happen in the event of a loss because of Mr. Sagers' representations about his "Finchler" as buyer and Blackfoot as "takeout."

Sometime on or before Wednesday, April 22, the record is inconsistent about when, there came a time when Messrs. Logan and Holdcroft expected Mr. Sagers' "Finchler" to appear but he did not. (testimony of Mr. Logan at Tr. 77 *et seq.*, 110 *et seq.*, and 126) On

April 22 they went to see the cows, and agreed between themselves to try to sell them. (testimony of Mr. Holdcroft at Tr. 364 *et seq.*) Meanwhile, as May 1, the date for delivery, approached and passed, Mr. Wright was pressuring Mr. Dietrich who was pressuring Mr. Sagers who was promising to move the cattle. (testimony of Mr. Wright at Tr. 268 *et seq.*, and Mr. Dietrich at Tr. 168 *et seq.*) On Saturday, May 9, Messrs. Holdcroft and Logan brought some prospects from Seligman, Arizona to see the cows, without result. (testimony of Mr. Holdcroft at Tr. 364 *et seq.*)

Tuesday, May 12, is the date of a check drawn by Mr. Sagers, payable to Victorio, for \$767,200.00 as final payment on the cattle. (complainant's exhibit 3, testimony of Mr. Deitrich at Tr. 184 *et seq.*)

Wednesday, May 13, at Mr. Logan's suggestion, Mr. Holdcroft phoned Mr. Sagers; that was the first time they talked. Mr. Sagers, referring to Mr. Dietrich, said "Well, don't worry about Harvey, I'll take care." He also assured Mr. Holdcroft that there was a "takeout," a person who would buy the cattle if the intended buyer failed to do so. (testimony of Mr. Holdcroft at Tr. 364 *et seq.*)

On Thursday, May 21, Mr. Sagers' \$767,200.00 check was deposited by Victorio in a PCA. (complainant's exhibit 3, testimony of Mr. Dietrich at Tr. 184 *et seq.*)

On Saturday, May 30, Messrs. Sagers and Holdcroft met for the first time. Mr. Holdcroft testified (Tr. 367-8):

A. Moe met me in Salt Lake City on my way back from Denver on May 30th. We had a conversation then and at that point in time I guess lightning finally struck me and I decided that this deal wasn't all that it was cracked up to be. He said that Blackfoot was having their own problems and they were out of it. Maybe I ought to talk to Harvey and see if something can be worked out, Harvey Dietrich.

At home that evening, Mr. Holdcroft phoned Mr. Dietrich who was then in California. That was the first time they talked and the first time Mr. Dietrich knew that Mr. Holdcroft or General Industries was involved in the matter. Also, in that phone call Mr. Holdcroft learned for the first time that the amount paid to Victorio as the down payment was \$70,000.00 and not \$110,000.00. Mr. Holdcroft testified (Tr. 369-71):

A. Basically what Moe had told me in Salt Lake on that Saturday was Victorio was now talking about wanting six hundred and forty some dollars a head to move the herd off because of interest on the money, pasture bill, and any number of things,

and I guess that's when lightning struck and I said, "Hey, wait a minute. This deal isn't all it's cracked up to be," and I went back to—back down here to Phoenix and I called Harvey in King City and said, "What's the deal?" To the best of my memory that's what—Harvey said they had seventy thousand dollars down on it, and they were about to have to do something different with Moe and if I had any ideas get to him.

I called Moe back that night and talked to him and said, "What happened to forty?" He said, "Well, we've got it." I says, "OK, if I can cut a deal with Harvey and take half the herd and apply half of the seventy thousand dollars down, will you send the forty thousand dollars down to Victorio?" And he said, "Yes." I did make that deal with Harvey, and called Moe back and said, "Wire it." He said, "OK." Two or three days went by and there wasn't any money. * * *

* * *

A. * * * So two or three days went by and I called Moe, and I said, "What happened to the forty thousand dollars?" And he said, "My partner wouldn't kick in his half."

Q. At any time at this point did you call Blackfoot directly?

A. Moe had asked me not to call Blackfoot, they were having some problems.

Q. And so you didn't.

A. So I didn't. And that was just about the end of Moe because I had talked to Harvey and he said they were going to pull the plug on him.

(testimony of Mr. Holdcroft at Tr. 367 *et seq.*; see also testimony of Mr. Dietrich at 169 *et seq.* and Mr. Wright at Tr. 273 *et seq.*) Messrs. Holdcroft and Dietrich met at Litchfield Park, Arizona, and Mr. Dietrich indicated that he, Mr. Holdcroft and Mr. Wright met at the Victorio office, apparently about the same time. (testimony of Mr. Dietrich at Tr. 169 *et seq.*, and Mr. Wright at Tr. 273 *et seq.*)

Monday, June 8, is the date of a bank advice to Victorio's PCA that payment had been ordered stopped on Mr. Sagers' May 12 \$767,200.00 check. (complainant's exhibit 3, testimony of Mr. Dietrich at Tr. 184 *et seq.*) We note that the June 8 advice is stamped on what appears to be a copy of an earlier advice of the same bank to the PCA, referring to the same check, dated May 21, the date the check was deposited by Victorio in the PCA, which contains the following: "SPECIAL INSTRUCTIONS: Hold 10 days

if ness," indicating that the check was processed as if it were a draft, not a check. The record does not show when Victorio received the information that the check would not be paid.

On Friday, June 19, Mr. Moyes sent Mr. Sagers a mailgram:

Victorio Land and Cattle Company hereby declares purchase contract #1302 dated March 18, 1981 between Victorio and Sagers terminated and null and void for Sagers repeated failure of performance after repeated demand and request by Victorio. Further, Victorio elects to retain deposit as damages for breach of such contract by Sagers and parties shall hereafter have no further rights or obligations pursuant to such contract.

On Monday, June 22, Mr. Moyes sent Mr. Sagers a letter confirming this. (complaint attachment D; testimony of Mr. Moyes at Tr. 322 *et seq.*, and Mr. Wright at Tr. 273 *et seq.*)

Mr. Sagers' pleadings do not contain any allegation that "Finchler" or anyone else agreed to buy the cows but defaulted. The record does not contain even an allegation, much less does it contain any evidence, of this. From that, and the failure of any buyer to materialize, we conclude that Mr. Sagers never had a buyer for the cows but intentionally misrepresented to Mr. Logan that he had one. Also, the evidence shows clearly that Mr. Sagers intentionally misrepresented to Mr. Logan that Blackfoot had agreed to buy the cattle if "Finchler" did not, to be a "takeout" in the language of Messrs. Holdcroft and Logan. Also the evidence shows clearly that Mr. Sagers intentionally misrepresented to Mr. Logan the terms of his agreement with Victorio, particularly the price per head and the total amount of the down payment. The evidence also shows that these misrepresentations were made with the intention that they be communicated to and relied upon by whomever was to put up the \$110,000.00, that they were made before General Industries expended the \$110,000.00, and that that expenditure was made in reliance upon them. We conclude that the evidence shows a fraud on Mr. Sagers on General Industries. *In re Cochise College Park*, 703 F.2d 1339, 1359 (9 Cir., 1983); *Nielson v. Flashberg*, 101 F.2d 335, 419 P.2d 514 (1966); *Callahan v. Wolfe*, 88 Idaho 444, 400 P.2d 938 (1965); *Bancroft v. Smith*, 80 Idaho 63, 323 P.2d 879 (1958); *Nab v. Hills*, 92 Idaho 877, 452 P.2d 981 (1969). It makes no difference that General Industries did not pay the money directly to Mr. Sagers, or that Mr. Sagers did not receive all of it. "It is not essential to actionable fraud that the guilty party should derive any benefit from his misrepresentation or concealment, or that he should conspire with another who does derive benefit. This rule applies

though defendant was himself a loser. The gravamen of the action is injury to plaintiff, not benefit to defendant. ' * * ' CJS *Fraud* §44. Note in particular *Nielson* and *Nab*, *supra*. It also makes no difference that the misrepresentations were made to Mr. Logan, but the loss was suffered by General Industries. "One has no right to rely on representations unless they were directly or indirectly made to him. On the other hand, representations made to a third person with the intent that they be shown or communicated to complainant may properly be relied on by the latter. * * * " CJS *Fraud* §36. (emphasis added) Also note the facts of *Nielson*, *supra*, which involved false weight certificates given to one Garcia to be given to plaintiff. We find Mr. Sagers' actions in this case to be an unjust practice within the prohibition of section 307(a) of the Act, 7 U.S.C. 208(a), on the basis of all of the above.

About respondent Sagers' cross-claim against respondent Logan, there is nothing in that document to show the basis thereof. We simply do not know on what allegations, evidence or law Mr. Sagers intended to rely in asserting that claim. It is dismissed accordingly.

Mr. Ellis testified about several transactions shortly before the events in dispute herein in which Mr. Sagers bought animals for immediate resale in states other than the ones where he bought them. It is undisputed that, in the events in dispute herein, Mr. Sagers agreed with Victorio to buy about 1400 animals in Arizona for immediate resale; Mr. Logan testified that Mr. Sagers represented to him that he had a buyer for them in Texas. Also, Mr. Wright testified (Tr. 263 *et seq.*) that he had "known of Moe for years," referring to Mr. Sagers, and that Mr. Sagers was "a trader." Thus the evidence shows that at the times material herein Mr. Sagers was engaged in business as a dealer as defined in the Act.

The initial written complaint was received on July 30, 1981, and General Industries' \$110,000.00 was expended the previous March. The Act provides a 90 day limitation on such complaints. However, in this case, concealment occurred as a natural consequence of the acts of Mr. Sagers complained of herein and found to be violative of the Act. 90 days before July 30 would be May 1. The evidence shows that the falsity of Mr. Sagers' representations remained unknown to complainant at least that late, and there is nothing to show that the falsity of those representations should have been discovered by complainant in the exercise of due care any earlier than that. Accordingly it is not necessary to fix the date when the cause of action accrued; whenever that date was, it is clear that the initial complaint was filed within 90 days of it. *Tom Reed Gold Mines Co. v. United Eastern Mining Co.*, 39 Ariz. 533, 8 P.2d 449 (1932); see also

dicta in *Jackson v. American Credit Bureau, Inc.*, 23 A.D. 199, 531 P.2d 932 at 935 (1975) and *Billings v. Sisters of Idaho*, 86 Idaho 485, 389 P.2d 224 at 227 *et seq.* (1964).

At the close of the oral hearing the parties present (Sagers) settled the dispute as among themselves and in that action complainant General Industries filed a proposed order which constitutes an assignment of its claim against Mr. Sagers to respondents Blackfoot and Logan. The order herein provides for payment in part to respondents Blackfoot and Logan according to the merits of their claims. We express no opinion on the merits of those parties' cross-claims against Mr. Sagers; such an opinion is rendered unnecessary by the assignment. We likewise express no opinion on the merits of the parties' cross-claims against each other, because of the settlement. Those cross-claims are dismissed accordingly. On the issue of the claims of respondents Ellis, Blackfoot and Logan, or any of them, against complainant, we likewise express no opinion because of the settlement. The complaint is dismissed as to them accordingly.

The record contains some indication that General Industries is attempting to recover from Victorio, by action in another forum, for all or part of what was paid to it in the course of the events in dispute herein. The record does not contain a copy of any pleading instituting such an action, or any complaint against Victorio, so on the issue of whether Victorio is liable to any of the parties to this proceeding we express no opinion. However, if there is any recovery by General Industries, Blackfoot, or Mr. Logan from Victorio, of whatever amount, to Victorio in the course of the events in dispute herein, then the amount of reparation ordered herein to be paid should be considered in light of the extent of such recovery.

Certain court decisions mentioned at the hearing have led to the possibility for a single transaction to be violative of section 1 of the Act (7 U.S.C. 2208(a)) which reads as follows:

It shall be the duty of every stockyard owner and stockyard to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

The basis of those decisions is, in substance, that a single transaction cannot be a "practice" or course of conduct of the respondent. We have consistently interpreted the Act as providing an order of reparation based on a single transaction on the ground that the word "practice" in the above quoted prohibition refers

practice of a particular respondent, but to a practice of the regulated industry.

Congress, in writing the prohibitions in section 307 and certain other sections of the Act as prohibitions of unjust or unfair "practices," had in mind the futility, in regulating a dynamic and changing industry, of specifying every act which should be prohibited, and intended, by those prohibitions and the provisions for administrative proceedings, to delegate broad discretion to the Secretary, subject to judicial review to prevent abuse, to determine from time to time what specific acts would be prohibited. This is clear in the following remarks in the debates on the Act, at 61 Cong. Rec. 1887:

MR. ANDERSON. * * *

It was asserted by the gentlemen who preceded me, to whom I have referred, that if there was to be a regulation of this industry it should be in direct prohibitions of law. We have been trying direct prohibitions of law for more than 100 years. They have proven absolutely inadequate for the regulation of industries as large and is industrially powerful as these with which we are now dealing.

Industry is progressive. The methods of industry and of manufacture and distribution change from day to day, and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of industry. So we have not sought to write into this bill arbitrary and iron-clad rules of law. We have rather chosen to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes of methods in distribution and manufacture and in industry in the country. Do the gentlemen who oppose this legislation object to prohibiting unfair practices and devices in commerce? Do they desire that the business of the country, or any of it, shall continue to use unfair methods or devices in commerce? Do they object to prohibiting discriminations against localities or against persons of this potentially and actually powerful industry?

* * * If we are going to have any sort of supervision of this industry we must set up some agency which can acquire the necessary technical and practical information in regard to the operation of the industry and the manufacture and distribution of the products involved, so that that agency can deal with the of-

fenses committed on the basis of the actual knowledge gained over a considerable period of time. * * *

* * * We have got to set up some sort of agency which, through an accumulation of experience, and after hearings and investigation and inquiry, can acquire the technical knowledge as to the operation of the industry necessary to enable that agency to act in a practical and sound manner. And so we have sought to set up in this bill an agency which can, through a close contact with the industry and from inquiry and investigation and through hearing of complaints, acquire the information that will enable it to deal with the industry upon a sound and practical basis.

From this part of the legislative history, and also the colloquy between Senators Kendrick and Simmons at 61 Cong. Rec. 2615-16, it is clear that, in prohibiting "every unjust * * * practice," Congress was referring, not to a course of conduct of a particular responder but to a course of conduct of the industry as a whole.

This interpretation of the word "practice" is supported by *Neugebauer v. Ryken*, Civ. 74-4018, USDC, D. So. Dak., So. Div. 1975, 34 A.D. 1712, and *Mid-South Order Buyers, Inc. v. Plains Valley Livestock, Inc.*, 210 Nebr. 382 315 N.W. 2d 2229, 41 A.D. (1982). In each of those cases, a court enforced a reparation order which we issued on account of a single transaction. Our administrative decisions involved in those court cases were *Neugebauer v. Ryken and Ryken*, 32 A.D. 636, 1488 (1973) and *Mid-South Order Buyers v. Tige Enterprises*, 34 A.D. 1691, 35 A.D. 232 (1976). Both courts considered legislative history of the Act as well as other decisions on the "single transaction" issue.

Neugebauer involved a single sale of 20 heifers by misrepresentation. The Court wrote in its opinion, "It would defeat the purpose of the Act to hold that the Secretary was devoid of jurisdiction in the instant case merely because the defendant has not made misrepresentations to the plaintiff or to other purchasers in the past."

Mid-South involved a single sale by a market agency of cattle consigned by a dealer, and retention of the proceeds on account of the dealer's pre-existing debt to the market agency with knowledge that this would cause a failure of payment to a firm which had sold some of the livestock to the dealer. The Court wrote in its opinion

The words of the statute, "and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful," [Section 307(a), 7 U.S.C.] §208(a), do not suggest that the word practice includes only that which is done ha-

bitually or repetitively by the particular stockyard or marketing agency. (Emphasis supplied.) Rather * * * repetition may be important only in determining whether a particular act is an unjust or unreasonable practice included within the evils which the act was intended to cure.

* * *

We hold that the terms "practice" and "practices" in [Section 307(a), 7 U.S.C.] §208(a) do not necessarily require repetitive acts. The term "practice" may involve a single transaction if the unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy. * * * Our holding should not be construed as indicating we disagree with the uniform holding of the cases we have discussed, that the reparation procedure does not give the Secretary jurisdiction as a check-collecting agency. The Secretary of Agriculture had jurisdiction in this case because the act involved was, for the reasons stated in the next section of this opinion, unjust and unreasonable.

This interpretation of the word "practice" is also supported by recent action of Congress itself. In 1976, Congress added to the Act section 409, 7 U.S.C., 1976 Ed., 228b, which includes the following:

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act.

This provision clearly refers to a single transaction and places it within the prohibitions of unjust and unfair practices, and reflects Congress' understanding that the prohibition of "every unjust * * * practice" may apply to a single transaction.

In *Vance v. Reed*, 495 F. Supp. 852, 39 A.D. 1117 (M.D. Tenn., Nashville Div. 1980), an action for enforcement of our reparation order published at 38 A.D. 418, involving a dealer's failure to pay in full for livestock purchased, defendant's motion for summary judgment, based on a contention of lack of jurisdiction because a single transaction was involved, was denied by the Court. It held, "After the 1976 amendments the Secretary's power is indisputable." It further held:

Facts alleged by plaintiff and upon which the Secretary based his decision appear to violate the plain terms of section [409, 7 U.S.C.] 228b. Regardless of whether defendant violated section 228b or whether the Secretary's decision was based on 228b, by reading section 228b *in pari materia* with section [307, 7 U.S.C.] 208 the Court holds that the intent of Congress was to make failure to make prompt payment of the full contract price—or complete failure to make full payment of the contract price—an unfair practice within the meaning of sections [202 and 307, 7 U.S.C.] 192 and 208.

The two United States Courts of Appeals which have considered this question have both, notwithstanding certain *obiter dicta*, enforced the reparation orders involved in the cases before them, of which two were based on two transactions each, and each other was based on a single transaction. *Hays Livestock Com'n. Co., Inc. v. Maly Livestock Com'n. Co., Inc.*, 498 F. 2d 925, 33 A.D. 1122 (10 Cir., 1974); *Rice v. Wilcox*, 630 F. 2d 586, 39 A.D. 883 (8 Cir., 1980). Our administrative decisions involved in those court cases were *Hays Livestock v. Maly Livestock*, 29 A.D. 216, 423, 788 (1970); *Rush County Sale Co. v. Maly Livestock*, 29 A.D. 386, 553, 922 (1970); *Plainville Livestock v. Maly Livestock*, 29 A.D. 393, 552, 920 (1970); and *Rice v. Wilcox*, 34 A.D. 1651, 35 A.D. 212 (1976).

In *Hays* a dealer bought cattle in four transactions and, in payment, issued drafts on a market agency to which the cattle were delivered and consigned for resale. The market agency sold the cattle and dishonored the four drafts, keeping the proceeds on account of the dealer's debt to it. In three reparation cases, one involving two transactions and each other involving a single transaction, we ordered both the dealer and the market agency to pay reparation to the sellers. The Court of Appeals upheld our orders. Its opinion refers to other cases holding a single transaction not to be within the prohibition of "every unjust * * * practice" and states about them, 498 F.2d at 930:

Federal courts have been at pains to point out that the Packers and Stockyards Act did not make of the Secretary a collecting agency. More specifically, the Act was not designed to provide a remedy for every worthless check or dishonored draft.

However, it also states about those cases, 498 F.2d at 931:

In any event, to the extent that the district court cases are not factually distinguishable, we respectfully decline to follow them.

In *Rice* a dealer bought cattle in two transactions but gave the seller no check or draft or other payment for them. The dealer then delivered the cattle purchased in one of the transactions to a market agency which sold them and kept the proceeds on account of the dealer's debt to it, less a small amount refunded to the dealer. In a reparation case, we ordered the dealer to pay reparation to the sellers on account of both transactions, and we ordered the market agency to pay reparation to the sellers on account of the transaction in which he retained proceeds. The Court of Appeals upheld our order, making a finding of a practice of the respondents in the case in that for some months the dealer had been buying livestock and paying for them with checks drawn on the bank account of the market agency. Its opinion states, 630 F.2d at 591:

[W]e emphasize that isolated transactions do not constitute a practice.

However, it also states, 630 F.2d at 592:

We agree with Chief Judge Nichol that the purposes of the Act are not served by interpreting the term "practice" to require several acts of dishonoring checks. *Neugebauer v. Ryken*, *supra*, 34 Agric. Dec. at 1715-17.

Guenther v. Morehead, 272 F. Supp. 721 (S.D. Iowa, C.D., 1967)) is the leading court decision that we do not have jurisdiction to issue a reparation order based on a single transaction. We believe it was in error, as explained herein. Also, the opinion in *McClure v. E.A. Blackshere Company*, 231 F. Supp. 678 (D. Md., 1964) contains language to the same effect, which is *obiter dicta* in that the Court, on diversity jurisdiction, held in favor of the complainant as we did, for a greater amount than we did. Our administrative decisions involved in those court cases were *Guenther v. Milan Livestock Auction*, 24 A.D. 787 (1965) and *McClure-Burnet Comm'n. Co. v. E.A. Blackshere Co.*, 20 A.D. 351, 475, 600 (1961). Neither the Secretary nor the United States was a party in either of those cases. In each of those cases the Court cited general definitions of the word "practice," found in various authorities, and concluded that a single transaction was not a "practice" of the respondent, without considering whether, as discussed above, Congress in section 307(a) intended the word "practice" to refer to a practice of the regulated industry. So far as the published opinions in those cases show, the parties did not present the latter question to the Courts for consideration.

In *Guenther* the Court also considered the decisions in *Stafford v. Wallace*, 258 U.S. 495, 2 A.D. 449, and *Denver Stock Yard v. Livestock Assn.*, 356 U.S. 282, in which the Supreme Court discussed the provisions of the Act which were intended to impair the monopolistic power of the "big five" packers. In neither of them did the Supreme Court hold the Act not to contain other provisions intended to accomplish other purposes, such as were referred to in the debates, 61 Cong. Rec. at 1801, as follows:

[I]n the case of the packers * * * the matters to be dealt with are great questions of combinations and monopolies and methods and practices of unfair competition, usually of great magnitude and country wide in their effect; whereas in the case of the stockyards the evils to be dealt with are a multiplicity of more or less minor matters, such as * * * minor injustices against shippers and purchasers * * *

In *Guenther* the Court also considered *Devries v. Sig Ellingson & Co.*, 100 F. Supp. 781 (D. Minn., 3d Div., 1951) and *Sig Ellingson & Co. v. DeVries*, 199 F. 2d 677 (8 Cir., 1952), cert. den. 344 U.S. 934. The opinion of the Court of Appeals in *DeVries* of course does contain the language quoted in the *Guenther* opinion, 272 F. Supp. at 726-7. However, that language is *obiter dicta*, as will be seen from the following. *DeVries* involved a sale of cattle by a market agency as agent for a consignor who had obtained the cattle by use of a worthless check. The action was brought by the consignor's defrauded seller against the market agency to recover damages for conversion. The defendant market agency contended that it was compelled by the Act to sell the cattle for the dishonest consignor, and the Courts held to the contrary. The basis for this holding is summarized in the Court of Appeals opinion, 199 F.2d at 679, as follows:

The Act was aimed at unjust discriminations incompatible with public utility operations, but it in no wise impairs the freedom of the market agencies to adopt proper measures to prevent and suppress frauds.

The basis is also summarized in the District Court opinion, 100 F. Supp. at 786-7, as follows:

Certainly it is not wrongful discrimination to refuse to aid a criminal in perpetrating a crime.

The language of the *DeVries* opinion quoted in the *Guenther* opinion was not necessary to this holding with respect to the Act in *DeVries*, and is *obiter dicta* on that basis.

The *Guenther* opinion, after quoting *DeVries*, refers to *United States v. Kramel*, 234 F.2d 577 (8th Cir., 1956) and *Adams v. Greeson*, 300 F.2d 555 (10th Cir., 1962). Those also were actions to recover damages for conversion, brought against market agencies, based on sales they made as agents for consignors contended to have acted in fraud of the plaintiffs. In *Kramel*, the applicable state law on conversion was found, in two state court decisions, too exempt market agencies subject to the Act from actions for conversion where they had no knowledge of any defect in title of their consignors, and where they were not negligent in that respect. Apart from that, the Act was not involved. In *Adams* the opinion contains, 300, F.2d at 557-8, the following:

The Packers and Stockyards Act does not undertake to fix the respective rights of the parties to a transaction in which the owner of livestock delivers possession thereof to a purchaser who gives in payment therefor a worthless check. The Act does not have the effect of altering in part or superseding in whole the respective rights of the immediate parties under state law to a transaction of that kind.

If any contention was made about the Act, on which this was a decision rather than *obiter dicta*, the *Adams* opinion does not show it.

Notwithstanding the language of the *DeVries* opinion quoted in the *Guenther* opinion, which as explained above is *obiter dicta*, and the above-quoted language of the *Adams* opinion, the Act does provide for reparation orders at sections 308 and 309, 7 U.S.C. 209, 210, as can be verified by a brief reading of those two sections. It also makes the reparation provisions "in addition to" remedies existing at common law or by statute." About the conclusion that the Secretary does not have jurisdiction to issue a reparation order based on a single transaction, it does not follow from *Devries*, *Kramel* or *Adams* since, so far as the published opinions show, none of those cases involved either the reparation provisions or the issue whether a single transaction can be within the term "practice" under the Act.

In the *Guenther* opinion the following also appears, 272 F. Supp. at 727:

It would seem that there is no jurisdictional basis for the adjudication of the Department under this Section [section 312 of the Act, 7 U.S.C. 213] as there must be a cease and desist order and a violation thereof before a complaint for damages may be pursued. *United States v. Brown*, 4 F.2d 270, 271 (D. Okl.)

Brown was a criminal prosecution under the conspiracy statute for violation of section 312, without a previous cease and desist order against the defendant. The Court sustained a demurrer to the indictment because of the lack of a cease and desist order. However the section of the Act involved in *Brown*, section 312, is not one of the reparation provisions, and *Brown* did not involve the reparation provisions and does not support the conclusion about those provisions for which it was cited in *Guenther*. Further, the reparation provisions, sections 308 and 309, 7 U.S.C. 209, 210, simply do not provide what the above-quoted language in *Guenther* says, as can be verified by briefly reading them.

In *Guenther* the Court cited *United States v. Donahue Bros.*, 317 F.2d 1019 (8th Cir., 1932), *Swift & Co. v. United States*, 317 F.2d 53, 22 A.D. 444 (7th Cir., 1963), and *Bowman v. United States Department of Agriculture*, 363 F.2d 81, 25 A.D. 958 (5th Cir., 1966) as being "grounded upon that distinction," referring to the distinction between a single transaction and a course of conduct. *Donahue* and *Bowman* did not involve either the reparation provisions of the Act or the issue whether a single transaction can be within the term "practice" under the Act, as can be verified by reading the published opinions therein. The only part of the *Swift* opinion which refers to that issue is the following:

Swift contends its "single sale lasting only three days on a single item" was not a violation under a reasonable interpretation of the Act. In support of its contention it cites *Muller & Co. v. Federal Trade Commission*, 142 F.2d 511, 519 (6th Cir. 1944). There an entire course of conduct was at issue and what the court said about specific acts has no relevancy here. In this case we are dealing with an act of Congress making it a violation to "(a) * * * use any unfair, unjustly discriminatory, or deceptive * * * device; (b) Make or give * * * any undue or unreasonable preference or advantage to any particular person * * * in any respect whatsoever." (Emphasis added.) We think the broad language "any" and "in any respect whatsoever" covers the single sale of 117,000 pounds of "picnics" to Kroger during the period April 23 to May 3. *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961). The fact that the independents here are small businessmen, *Kor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959), has no bearing on the antitrust principle which inspires the act in question. (Footnote reference omitted)

This does not support the conclusion that a single transaction cannot be within the term "practice" under the Act. Moreover, it lends some support to our position that a single transaction can be within that term.

The *Guenther* opinion also discusses *Capitol Packing Company v. United States*, 350 F.2d 67, 24 A.D. 1421 (10th Cir., 1965). That case did not involve either the reparation provisions of the Act or the issue whether a single transaction can be within the term "practice" under the Act, as can be verified by reading the published opinion therein.

The authorities cited in *Guenther* do not support its conclusions about our jurisdiction in reparation cases.

As previously stated, respondent Sagers was a dealer as defined in the Act, and his action in dispute herein has been found in violation of the prohibition quoted above, in section 307 of the Act (7 U.S.C. 208). Of the provisions enumerated in section 309(a) of the Act (7 U.S.C. 210(a)), which provides for reparation orders against dealers for violation of those provisions, that is the only one which can be violated by a dealer. In *Rice, supra*, our reparation order against the respondent dealer in that case, Wilcox, was enforced by the Court of Appeals, as discussed extensively in the published opinion therein.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR §2.85, 42 F.R. 4395, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 Ed., appendix p. 764). It constitutes "an order for the payment of money" and Blackfoot and Mr. Logan each is a "person for whose benefit such order was made" within the meaning of section 309(f) of the Act (7 U.S.C. 210(f)).

Under that section if respondent Sagers does not comply with this order within the time limit in this order, complainant General Industries, or Blackfoot or Mr. Logan, may within one year of the date of this order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of respondent Sagers, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent

stage of the proceedings unless they accrue upon his appeal. section further provides that, if the petitioner finally prevail shall be allowed a reasonable attorney's fee to be taxed and lected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any par any such suit be filed with the Hearing Clerk, USDA, Washing D.C. 20250, for inclusion in the file on this reparation proceedin is further requested that if the construction of the Act, or the j diction to issue this order, becomes an issue in any such prompt notice of such fact be given to the Office of the Ge Counsel, USDA, Washington, D.C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proe ing, or to reconsider an order, see rule 17 of the Rules of Practi CFR §202.117, 43 F.R. 30517, July 14, 1978.

On a respondent's right to judicial review of such an order, *Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 i 1063 (8 Cir., 1971). On a complainant's right to judicial review such an order, see 5 U.S.C. 702-3 and *United States v. ICC*, U.S. 426.

ORDER

Within 30 days of the date of this order, respondent H.M. "N Sagers shall pay the sum of \$110,000.00 plus interest thereon at rate of 13% per annum from May 1, 1981 until paid, as follows:

(a) to Blackfoot Livestock Commission Co. \$7,500.00 plus in est thereon at the rate of 13% per annum from February 28, 1 until paid;

(b) to Bill Logan \$45,000.00 plus interest thereon at the rat 13% per annum from February 1, 1983 until paid;

(c) to complainant General Industries, Inc. the balance.

The complaint is hereby dismissed as to respondents Ellis, Bla foot and Logan, and all cross-claims are hereby dismissed.

Copies hereof shall be served upon the parties.

COURT DECISION

FINER FOODS SALES CO., INC. *v.* JOHN R. BLOCK, SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE, and UNITED STATES OF AMERICA. Civil Action No. 82-1843. (PACA Docket No. 2-5543) Decided May 27, 1983.

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Before WILKEY and GINSBURG, Circuit Judges, and FRIEDMAN, Circuit Judge, United States Court of Appeals for the Federal Circuit.

PETITION FOR REVIEW OF AN ORDER OF THE
DEPARTMENT OF AGRICULTURE

Friedman, Circuit Judge:

This is a petition for review of a decision of the Secretary of Agriculture that the petitioner, *Finer Foods Sales Co., Inc.*, a licensee under the Perishable Agricultural Commodities Act, 7 U.S.C. §§499a-499s (1976 & Supp. V 1981) ("Act"), was guilty of "flagrant and repeated" violations of the Act. The effect of that determination is to prohibit any person "responsibly connected" with the petitioner from working for another licensee for at least a year. We affirm.

I.

The Perishable Agricultural Commodities Act requires persons who buy or sell significant quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture. 7 U.S.C. §499c (1976). The Act subjects licensees to various requirements and prohibitions. Section 2(4) of the Act, 7 U.S.C. §499b(4) (1976), the provision here involved, makes it unlawful for any licensee "to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had."

The petitioner was a licensee under the Act. It was first licensed in 1977, and its license was renewed annually until 1980. The Judicial Officer of the Department of Agriculture, to whom the Secretary has delegated his adjudicatory functions under the Act (7 C.F.R. §2.35 (1982)), found that "[a]t the time of its licensing in 1977 [the petitioner] was fully advised of the . . . responsibilities of

licensees under the Act to make full and prompt payment for its perishable agricultural commodities purchases."

In January 1978, the petitioner obtained a revolving loan from the BVA Credit Corporation ("BVA"), a division of the Bank of Virginia. The loan was computed on a daily basis, and was secured, apparently, by a pledge of the petitioner's accounts receivable and inventory.

In February 1979, Paris Foods sold and delivered to the petitioner two shipments of green beans at an invoice price of \$27,257. When Paris Foods had not been paid by May, it submitted an informal complaint to the Department of Agriculture, which notified the petitioner of the complaint. The latter admitted its indebtedness and agreed to pay the amount due in two installments. The petitioner sent its check for the first installment of \$14,000 in June, as agreed.

Before the check was presented for payment, however, BVA had taken possession of the petitioner's assets and "frozen" its bank account. It took this action the day after the petitioner's president had told BVA that his company was considering making an assignment for the benefit of creditors. Several days later the petitioner made the assignment.

As a result of BVA's "freezing" of the petitioner's bank account, the petitioner's \$14,000 check to Paris Foods was not paid. Paris Foods notified the Department of the default, and the Department began an investigation of the reasons for nonpayment. Upon ascertaining that the petitioner had made an assignment for the benefit of creditors and was insolvent, the investigator reviewed the petitioner's books and records and discovered that the petitioner had made 23 other purchases of perishable agricultural commodities for which it had not paid. These debts, which involved transactions over a period of almost five months, covered 18 transactions with one seller totaling approximately \$21,000 and five transactions with another seller totaling approximately \$27,000.

After it learned of the petitioner's insolvency, the Department began a formal reparations proceeding on behalf of Paris Foods against the petitioner. In its answer to the reparations complaint, the petitioner admitted that it owed the money as alleged. On February 12, 1980, the Judicial Officer entered an order concluding that the petitioner had violated section 2 of the Act and directing the petitioner to pay Paris Foods \$27,257 within 30 days.

Four days earlier the insolvency trustees of the petitioner, following their sale of the petitioner's assets, had made a seven percent pro rata payment to all the creditors, including Paris Foods.

On January 24, 1980, the Secretary issued a formal disciplinary complaint against the petitioner based upon the 24 transactions in which the petitioner had failed to pay its debts. After a hearing, the Administrative Law Judge issued a recommended decision that the petitioner had violated the Act and that its license should be revoked.

The petitioner appealed the decision to the Judicial Officer, who in June 1982 upheld the finding of violation. He held that the petitioner's failure to make payment in the 24 transactions constituted "flagrant and repeated violations of the Act and the Regulations." The Judicial Officer further ruled that because the petitioner's officials had acted with "full knowledge of what they were doing," the violations were "willful" under the Administrative Procedure Act.

The Judicial Officer modified the recommended order by eliminating the provision revoking the petitioner's license. He did so because the license had expired, the petitioner was insolvent, and it was no longer actively involved in a business the Act covered. In these circumstances, he concluded, revocation would be a meaningless act. He ordered, however, publication of the finding that the petitioner flagrantly and repeatedly had violated the Act. Publication of the Judicial Officer's decision would have the same effect as a license revocation upon the ability of certain officials of the petitioner to be employed by other licensees. *See infra* pp. 782-783.

II.

The petitioner does not challenge the Judicial Officer's determination that its failures over a five-month period to pay \$75,000 due on 24 transactions were "flagrant and repeated violations" of the Act. It argues only that in reaching that decision the Judicial Officer violated procedural requirements of the Administrative Procedure Act and the Perishable Agricultural Commodities Act, that he improperly failed to consider mitigating circumstances, and that he should have excepted the current employment of the petitioner's president from the statutory bar upon employment by other licensees of persons "responsibly connected" with the petitioner.

III.

A. Section 9(c) of the Administrative Procedure Act, 5 U.S.C. §558(c) (1976), provides that "[e]xcept in cases of willfulness . . .," a license may not be revoked unless the licensee has been given "(2) opportunity to demonstrate or achieve compliance with all lawful

requirements." The petitioner contends that the Secretary violated this provision because he did not give the petitioner the opportunity to show or achieve compliance with section 2(4) of the Perishable Agricultural Commodities Act before instituting the disciplinary proceeding. The Judicial Officer correctly held, however, that the petitioner's violations were willful, so that the opportunity-to-comply requirement of section 9(c) was inapplicable.

[1] "Under [the Perishable Agricultural Commodities Act], an act is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *American Fruit Purveyors, Inc. v. United States*, 618 F.2d 370, 374 (5th Cir. 1980). See also *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830, 53 S.Ct. 53, 42 L.Ed.2d. 55 (1974). The Judicial Officer had ample basis for concluding that the petitioner's violations of the Act were willful.

As noted, the Judicial Officer found that when the petitioner received its license in 1977, it was "fully advised of the ... responsibilities of licensees under the Act to make full and prompt payment for its perishable agricultural commodities purchases." He further found that the petitioner's officers "were fully aware of the potential for non-payment which was a condition pregnant in the loan agreement" with BVA, and "had full knowledge of what they were doing." When the loan was negotiated, the officers were aware of the somewhat precarious financial condition of petitioner, which "had been losing money since fiscal year 1977."

The petitioner knew that under the loan agreement BVA could and was likely to take possession of the petitioner's assets, including its bank account, if it appeared that the petitioner was in sufficient financial trouble to raise doubts about its ability to repay the loan. That was precisely what happened when BVA foreclosed on the collateral the day after the petitioner's president told the lending institution that the petitioner was considering making an assignment for the benefit of creditors.

Despite the petitioner's awareness of (1) the statutory requirement of full and prompt payment, (2) the likelihood that BVA would foreclose on its collateral if it believed that its loan was threatened and (3) the company's serious financial problems, the petitioner continued to purchase perishable agricultural commodities. As the Judicial Officer pointed out: "All of the ... transactions involved in this case were entered into well after [the petitioner] knew it was having great difficulty paying its bills." The petitioner's failure to pay was willful because it was "done with careless disregard of st

tory requirements." *American Fruit Purveyors*, 630 F.2d at 374. When the petitioner made the purchases involved in this case, it necessarily knew that it probably would not be able to pay for them in accordance with the statutory requirement.

[2] The petitioner argues, however, that the Secretary's action was impermissible because, prior to instituting the disciplinary proceeding, he did not make a formal determination of willfulness. Nothing in the Administrative Procedure Act imposes that requirement or supports the petitioner's apparent contention that the determination of willfulness itself may be made only after a hearing. If in fact the violations were willful, the requirement in section 9(c) (2) of opportunity for correction of the violations is inapplicable. When the Secretary instituted the disciplinary proceeding without first giving the petitioner the opportunity to cure the violation, necessarily he determined that the violations were willful. Since at that time he already knew the extent and character of the violations, he had an adequate basis for making that determination.

Indeed, it is difficult to see how giving the petitioner the opportunity to cure its violations could have helped it. Long before the Secretary initiated the disciplinary proceedings, the petitioner had become hopelessly insolvent. Upon the sale of the petitioner's assets, the proceeds enabled the insolvency trustees to pay the petitioner's creditors only seven percent on their claims. When the Secretary instituted the disciplinary proceedings, the violations long since had been committed. Even assuming *arguendo* that so belated a payment could constitute compliance, the petitioner could not have paid the debts at the time the complaint was filed.

[3] B. The petitioner contends that because the Judicial Officer signed the reparations order, he was barred by section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554(d) (1976), from deciding the disciplinary case. Insofar as here pertinent, that section provides that an employee

engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision . . . except as witness or counsel in public proceedings.

The petitioner's theory apparently is that the signing of the reparations order by the Judicial Officer constituted "the performance of investigative or prosecuting functions" and that since the disciplinary proceeding was "a factually related case," section 5(d) precluded him from participating in the disciplinary case.

As the Judicial Officer stated in denying the petitioner's motion that he disqualify himself in the disciplinary proceeding, the motion was "based on a misconception as to how reparations dockets handled in practice." He described that practice as follows:

Reparation orders are prepared for the signature of the Judicial Officer by the Office of the General Counsel, and after review by the Regulatory Branch, they are filed with the Hearing Clerk. The Judicial Officer discusses the matter with the attorneys or administrative officials only if there is a dispute between them or if the Judicial Officer, *sua sponte*, disagrees with the proposed order. In practice, there is rarely a dispute between the administrative officials and the attorneys, and the Judicial Officer rarely disagrees with the proposed order. In fact, such disagreements or disputes occur in perhaps one or two cases out of some 300 cases handled each year. . . .

. . . In such cases [*i.e.*, where there is no disagreement or dispute], it is the practice of the Judicial Officer (i) not to read the names of the parties, and, therefore, the Judicial Officer has no recollection of ever having signed a reparation order involving the respondent; (ii) not to read the findings of fact in the case (iii) not to read the entire conclusions. Instead, he skims the conclusions looking for points of law. In a typical case, he spends approximately 30 seconds reviewing and signing the decision.

In signing the reparations order, the Judicial Officer did not perform any "investigative or prosecuting" function. He merely performed a ministerial act that did not involve him in the merits of the reparations case, in which the petitioner had admitted liability and there was nothing in controversy. In that situation the issuance of an order directing the petitioner to repay the amount admitted owed was a routine task that did not require the Judicial Officer to exercise any discretion or make any legal or factual judgments.

The petitioner argues, however, that the Judicial Officer received advice concerning the reparations order from other Department employees who themselves were involved in prosecuting the reparations case, and that the receipt of such advice itself constituted the performance of an investigative or prosecuting function. There is nothing in the record that supports the petitioner's claim that Department officials had such *ex parte* contact with the Judicial Officer. Indeed, the Judicial Officer stated exactly the opposite in denying the motion for his disqualification: "In the *Finer Food* case, there was no disagreement or dispute, and there was no

discussion between the Judicial Officer and the attorneys or the administrative official." The Department attorneys' preparation of the order, which the Judicial Officer routinely signed, did not amount to the performance of an investigative or prosecuting function by the Judicial Officer that under section 5(d) barred him from subsequently deciding the factually related disciplinary case.

The petitioner seemingly suggests that the alleged commingling of investigative or prosecuting functions with the decision function in the Judicial Officer denied it procedural due process. Our holding that the Judicial Officer's ministerial participation in the reparations proceeding did not bar him under section 5(d) from deciding the disciplinary case also requires rejection for the constitutional claim. As this court has noted:

[A]s to adjudications, the combination in one administrative body of adjudicative with other functions violates constitutional guarantees only when the combination "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Any claim of inherent bias must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. at 47, 95 S.Ct. at 1464.

Porter County Chapter of the Isaac Walton League v. Nuclear Regulatory Comm'n, 196 U.S. App. D.C. 456, 464, 606 F.2d 1363, 1371 (1979) (citations omitted).

There is nothing in the record that even suggests any constitutional defect in the Judicial Officer's decision of the disciplinary proceeding following his signing of the reparations order.

IV.

[4] The petitioner contends that the Secretary violated section 6 of the Perishable Agricultural Commodities Act, 7 U.S.C. §499f (1976). According to the petitioner, the Secretary cannot issue a formal disciplinary complaint against a licensee unless the aggrieved party previously filed with the Secretary an informal complaint seeking such action, and that informal complaint was served on the licensee. The Judicial Officer correctly rejected this contention on the ground that the statutory provision upon which the petitioner relies to establish this alleged requirement applies only to reparations proceedings and not to disciplinary proceedings.

The first three subparagraphs of section 6 contain the pertinent provisions:

Section 6(a) permits "[a]ny person complaining of any violation of any provision of section [2, 7 U.S.C. § 499b], which defines illegal practices by licensees, including the failure to pay promptly involved here] . . . by any [licensee] [to] apply to the Secretary by petition . . . whereupon, if, in the opinion of the secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the [licensee], who shall be called upon to satisfy the complaint, or to answer it in writing."

Section 6(b) authorizes state and territorial officials having jurisdiction over licensees, any employee of the Department of Agriculture, "or any interested person" to file with the Secretary "a complaint of any violation of any provision of this chapter" by any licensee and to "request an investigation of such complaint by the Secretary."

Section 6(c) provides that, if reasonable grounds appear to the Secretary "for investigating any complaint made under this section, the Secretary shall investigate such complaint and may, if in his opinion the facts warrant such action," serve the complaint "on the person concerned and afford such person an opportunity for a hearing thereon."

These subsections do not expressly state which of them applies to reparations proceedings, which to disciplinary proceedings, and which to both. Analysis of their language and structure, however, indicates that the requirement in section 6(a) for the filing and serving upon the licensee of an informal complaint of a third person—the provision upon which the petitioner rests its argument that the Secretary violated section 6—applies only in reparations proceedings and not in disciplinary proceedings.

The purpose of a reparations proceeding is to require the licensee to satisfy a monetary claim against him. If the Secretary concludes that an informal reparations complaint filed with him has merit, he is required to forward a copy to the licensee, who shall be "called upon to satisfy the complaint, or to answer it in writing." This provision is designed to give the licensee the opportunity through an informal proceeding to pay the amount due or to explain the situation, and thus to avoid a formal disciplinary proceeding with the likelihood of sanctions. The informal complaint that section 6(a) authorizes covers only violations of section 2 of the Act, which defines the unfair practices by licensees that the Act prohibits.

In contrast, section 6(b) authorizes a broad group of persons to file with the Secretary "a complaint of any violation of any provision of" the Act by a licensee and to "request an investigation of such complaint by the Secretary." Nothing in this subsection provides for service of the complaint upon the licensee to give it the opportunity "to satisfy the complaint," as section 6(a) mandates. The only situation in which the Act may require the filing and service upon the licensee of an informal complaint is where the aggrieved party has filed an informal reparations claim.

The Secretary's regulations support this interpretation of the Act. They provide that on the basis of an informal complaint the Secretary may initiate an investigation, which may result in either a reparations proceeding or a disciplinary action. 7 C.F.R. §47.3(b)(1) (1983). Where the Secretary receives an informal complaint from an aggrieved party and determines that further action is warranted, the Director of the Fruit and Vegetable Division of the Department's Agricultural Marketing Service, "in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts or conduct concerning which complaint is made." *Id.* §47.3(b)(2). This requirement is not included in the regulations governing disciplinary complaints. *See* 7 C.F.R. §1.130-1.151 (1982).

Section 6(c) specifies the procedure the Secretary is to follow if he decides to institute a formal reparations or disciplinary proceeding as a result of a complaint filed with him. If he takes that action, the formal complaint must be "served by registered mail or by certified mail" upon the licensee, who has "an opportunity for a hearing thereon." (In contrast, section 6(a) requires only that the informal complaint be "forwarded" to the licensee.)

The Secretary concededly complied with the procedures section 6(c) requires for a formal disciplinary proceeding. The disciplinary complaint was served upon the petitioner, which received a hearing on the violations before an Administrative Law Judge. The Act required no more. Petitioner gives no convincing reason why the informal complaint procedure for reparations cases, which serves the important practical purpose of enabling the licensee to satisfy its obligation informally, should be applied to the quite different situation in which the Secretary has initiated formal disciplinary action.

V.

The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These in-

clude the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment—not excuses.'" *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). *See also In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. §499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S. Rep. No. 2507, 84th Cong., 2d Sess. (*citing* H. Rep. No. 1196, 84th Cong., 1st Sess.), *reprinted in* 1956 U.S. Code Cong. & Ad. News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.

Quoting In re John H. Norman & Sons Distrib. Co., 37 Agric. Dec. 705, 720 (1978).

[5] In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S.Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

[6] The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

The one extenuating circumstance the Judicial Officer did consider was the petitioner's point that the creditors had accepted the insolvency trustees' distribution of seven percent of their claim "in

full satisfaction" of those debts. Such a belated payment of a small portion of a licensee's obligation does not constitute the making of the "full payment promptly" that section 2(4) requires. *Marvin Tragash Co.*, 524 F.2d at 1258.

VI.

[7] Finally, the petitioner argues that the Judicial Officer should have taken action to avoid the bar the Act may place upon the employment of the petitioner's former president by other licensees.

Section 8(b) of the Act, 7 U.S.C. §499h(b) (1976), bars any licensee from employing, without the approval of the Secretary, "any person who is or has been responsibly connected with any person ... (2) who has been found ... to have committed any flagrant or repeated violation of section 2 [7 U.S.C. §499b] The Secretary may approve such employment ... after one year following the ... finding of flagrant or repeated violation" if the licensee furnishes a surety bond, and after two years if he does not. Because the Judicial Officer found that the petitioner committed flagrant and repeated violations of section 2(4) (7 U.S.C. §499b(4)), the effect of section 8(b) is to bar from employment by a licensee for at least one year any person who was "responsibly connected" with the petitioner.

After the petitioner made its assignment for the benefit of creditors, its assets were sold to Sandler Foods, another licensee under the Act, which employed the petitioner's former president, Melvyn Siegel. The record does not show the nature of Mr. Siegel's work with Sandler Foods. The petitioner states, however, that only three to five percent of Sandler Foods' business is in perishable agricultural commodities—the same percentage of such business that the petitioner did—and that Mr. Siegel does not handle any of that business. For these reasons, the petitioner contends that Mr. Siegel should not be subject to the statutory bar upon his employment by Sandler Foods.

The jurisdiction of this court is invoked under 28 U.S.C., §2344 (1976), which authorizes "[a]ny party aggrieved" by a final order to seek judicial review. Mr. Siegel is not a party to these review proceedings. Only the petitioner is. The petitioner, which is a corporation, has not shown how it has been or could be aggrieved by any bar upon the employment of its former president by another licensee. The petitioner was aggrieved by the Judicial Officer's findings that it had committed flagrant and repeated violations of the Act, and that is the only determination it has standing to challenge in this court.

Mr. Siegel or his new employer, but not the petitioner, may challenge the effect of the determination of the petitioner's violations

upon Mr. Siegel's employment with another licensee. There is a procedure by which this may be done, and that is the proper method by which the issue may be litigated and determined.

As noted, it is the statute that may bar Mr. Siegel's employment with another licensee. The Judicial Officer's decision merely triggered that bar. The bar, however, is not self-executing but requires further action by the Secretary before it becomes effective.

The Secretary's regulations provide that following an administrative determination that a person was "responsibly connected" with a licensee subject to a disciplinary order, the Department will so advise the person in writing. 7 C.F.R. §47.49 (1983). Upon the receipt of such notice the person may obtain a hearing to determine that question. *Id.* After the hearing, the presiding officer renders a decision. *Id.* §47.62. Either party may appeal to the Administrator of the Agricultural Marketing Service, who issues the final order. *Id.* §47.63-47.64. That order is judicially reviewable. 28 U.S.C. §2342(2) (1976); *Quinn v. Butz*, 166 U.S. App. D.C. 363, 510 F.2d 743 (1975).

If, as seems likely, the Department initially determines that Mr. Siegel was "responsibly connected" with the petitioner and therefore is barred from employment with another licensee, and so notifies him, he can then obtain a hearing. At that hearing Mr. Siegel may litigate the question whether he was "responsibly connected" with the petitioner, and he "may also raise any other factual, legal, or constitutional arguments pertinent to the proposed penalty, when and if such penalty is sought by the Secretary." *Marvin Tragash Co.*, 524 F.2d at 1258-59.

That administrative proceeding is the proper forum in which all aspects of Mr. Siegel's relationships with the petitioner and with Sandler Foods can be explored. On the basis of the information developed at the hearing, the Secretary can then make an informed determination whether the statutory bar against employment by another licensee properly is applicable to Mr. Siegel. The question of the bar, however, is not an issue in the present disciplinary proceeding, in which the question is whether the petitioner violated section 2(4). *See George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d 95 S.Ct. 53, 42 L.Ed.2d 55 (1974)). The Judicial Officer properly refused to consider the issue of Mr. Siegel's employment.

The order of the Judicial Officer is

Affirmed.

DISCIPLINARY DECISIONS

(No. 22,565)

In re: SAMUEL SIMON PETRO, d/b/a SAM PETRO PRODUCE. PACA
Docket No. 2-5970. Decided March 23, 1983.

**Not financially responsible—Failure to make full payment promptly—License
revoked**

Respondent failed to make full payment promptly for perishable agricultural commodities which demonstrates that he is not financially responsible. The numerous violations constitute willful, repeated and flagrant violations of the Act. Therefore, respondent's license was revoked.

Edward M. Silverstein, for complainant.

James N. Adams, Houston, Texas, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter the "Act"), the Regulations promulgated pursuant to the Act (7 CFR 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 CFR 1.130 through 1.151; hereinafter the "Rules of Practice"). The proceeding was instituted by a complaint filed on March 11, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that Samuel Simon Petro, d/b/a Sam Petro Produce, (hereinafter "Petro" or "respondent"), violated section 2 of the Act (7 U.S.C. 499b) by failing to make full payment promptly of the agreed purchase prices for 40 lots of perishable agricultural commodities, for a total of \$248,086.95. Respondent filed an answer on March 30, 1982, in which he denied violating the Act.

An oral hearing was held on October 28, 1982, before Administrative Law Judge John G. Liebert, in Houston, Texas. Complainant was represented by Edward M. Silverstein, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent was represented by James N. Adams, Esq., 6805 Edgemoor Street, Houston, Texas 77074. Following the con-

clusion of the hearing the parties were given an opportunity to file proposed findings of fact and briefs. Complainant filed proposed findings of fact and brief on November 5, 1982. Respondent did not file any.

PERTINENT STATUTORY PROVISIONS

7 U.S.C. 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

7 U.S.C. 499d. Issuance of license

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided*, That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further*, That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b), plus \$5, which shall be deposited in the Perishable Agricultural Commodities Act

fund provided for by section 3(b): *And provided further*, That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;

7. U.S.C. 499(g). Suspension of license for failure to obey reparation order or appeal

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: Provided, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

7 U.S.C. 499h. Grounds for suspension or revocation of license

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

PERTINENT REGULATIONS

7 C.F.R. 46.2(aa) Definitions

'Full payment promptly' is the term used in the Act in specifying the period of time for making payment without

committing a violation of the Act. 'Full payment promptly,' for the purpose of determining violations of the Act, means:

(5) Payment for produce purchase by a buyer, within 10 days after the day on which the produce is accepted.

FINDINGS OF FACT

1. Respondent is an individual whose address is 2520 Airline Drive, Houston, Texas 77009.

2. Pursuant to the licensing provisions of the Act, license number 761881 was issued to respondent on June 30, 1976. This license was renewed annually and is next subject to renewal on or before June 30, 1983. Respondent's license was automatically suspended on July 13, 1982, pursuant to §7(d) of the Act, 7 U.S.C. 499g(d), for failure to satisfy a reparation award issued pursuant to the Act. See *John Manning & Co., Inc. v. Samuel Simon Petro d/b/a Sam Petro Produce*, 41 Agric. Dec. 1261 (1982). In addition, the facts disclose, and respondent admitted, to the entry of and failure to satisfy the following reparations awards:

(a) *Agri Sales v. Samuel Simon Petro d/b/a Sam Petro Produce*, 41 Agric. Dec. 1415, (1982);

(b) *Bello Tomatoe, Inc. v. Samuel Simon Petro d/b/a Sam Petro Produce*, 41 Agric. Dec. 1648, (1982);

(c) *Malvin G. Ford d/b/a Malvin Ford Produce v. Samuel Simon Petro d/b/a Sam Petro Produce*, 41 Agric. Dec. 2028, (1982);

(d) *Douglas Case d/b/a Case Produce Company v. Samuel Simon Petro d/b/a Sam Petro Produce*, 41 Agric. Dec. 1825, (1982);

(e) *Tomato Man, Inc. v. Sam Petro Produce*, 41 Agric. Dec. 2042, (1982). These reparation orders were issued during the period August 11, 1982 through October 13, 1982. The total of these reparation awards is approximately \$292,013.50.

3. This proceeding involves other additional transactions during the period May 1981 through November 1981, whereby respondent purchased, received and accepted 40 lots of perishable agricultural commodities from 11 sellers in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$248,086.95. The detail of these transactions are more fully set forth in Paragraph 5 of the Complaint. At the time of hearing respondent admitted to these transactions but stated that some of the amounts owing have since been reduced by payments. However, approximately 60 percent of the amounts was stated to be still owing, i.e., approximately \$150,000 is still outstanding.

4. In spite of the automatic suspension of respondent's license on July 13, 1982, respondent has continued in business, albeit on a very limited scale and on a cash basis.

5. During the time of the transactions referred to in Findings of Fact No. 3, respondent was personally conducting the business which sustained very substantial losses in 1981. It is respondent's contention that if he could collect from his debtors he could substantially pay off his obligations. However, the facts disclose that many of his substantial debtors are either out of business, or are themselves insolvent. Moreover, the scale of respondent's business on a cash basis cannot reasonably be expected to generate enough profit to pay off his obligations, even if it were possible under the law to do so.

6. The acts of respondent in failing to make full payment promptly of the agreed purchase prices for the 40 lots of perishable commodities it purchased, received, and accepted, as more specifically alleged in Paragraph 5 of the Complaint, constitute willful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. 499b).

CONCLUSIONS

Congress intended by enactment of the Act to establish bars to preclude all but financially responsible persons from engaging in the businesses subject to the Act. *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *Marvin Tragash Co. v. United States Dept. of Agr.*, 524 F.2d 1255, 1257 (5th Cir. 1975). By his failure to pay his accounts respondent has demonstrated that he is not financially responsible.

Section 2(4) of the Act (7 U.S.C. 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker (as defined in 7 U.S.C. 499a(5), (6) and (7)), to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department (7 CFR §46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted. The fact that respondent has made partial payment late and would like to make full payment eventually does not relieve respondent of his statutory obligations.

Respondent's failures to make timely payment, and payment in full, are clearly in violation of the prohibitions of section 2 of the Act (7 U.S.C. 499b). *Atlantic Produce*, 35 Agric. Dec. 1631, 1329 (1976), *aff'd mem.*, 568 F.2d 77s (4th Cir.), *cert. den.*, 439 U.S. 819 (1978).

The numerous violations committed by respondent constitute flagrant and repeated violations of the Act. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236, (1973), *aff'd sub. nom.*, *George Steinberg and Son, Inc. v. Butz*, *supra*, 491 F.2d 988. Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, Supra*, 32 Agric. Dec. 236, 263-269; *Goodman v. Benson*, 286 F.2d 896 (7th Cir., (1961)). (See also *American Fruit Purveyors v. United States*, *supra*, 630 F.2d 370, 374 and cited cases.)

Without question respondent's actions as disclosed by the evidence are so clearly in violation of the Act and the Regulations as to require revocation of his license.

ORDER

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final May 2, 1983.—Ed.]

(No. 22,566)

In re: FRESH PAK, INC. PACA Docket No. 2-6207. Decided May 17, 1983.

Misrepresentation—Suspension of license—Consent

Respondent sold and shipped in interstate commerce one lot of potatoes that was misrepresented as to grade and/or quality, which constitutes a willful and flagrant violation of the Act. Respondent's license was suspended for 14 days.

Dennis Becker, for complainant.

D. Wayne Gittinger, Seattle, Washington, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER
PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on February 1, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that on August 16, 1982, Respondent shipped, sold or offered to sell one lot of potatoes to a buyer, in interstate commerce, on which it misrepresented by word, mark, stencil, label, statement or deed the grade and/or quality of potatoes in the containers as "U.S. No. 1."

A copy of the complaint was served on Respondent. Respondent filed an answer thereto, denying all the material allegations in the complaint, but has subsequently filed an amended answer admitting the allegations and consenting to the issuance of a decision and order in this case. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following decision and order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Respondent, Fresh Pak, Inc., (hereinafter "Respondent"), is a Washington corporation, whose mailing address is P.O. Box 509, Pasco, Washington 99301.

2. Pursuant to the licensing provisions of the Act, license number 821441 was issued to Respondent on June 22, 1982. This license next is subject to renewal on or before June 22, 1983.

3. As set forth more fully in paragraph 5 of the complaint, on August 16, 1982, Respondent violated Section 2(5) of the Act (7 U.S.C. 499b(5)), by selling or offering for sale and/or shipping in interstate commerce a lot of misrepresented potatoes.

CONCLUSIONS

Respondent has willfully and flagrantly violated Section 2 of the Act (7 U.S.C. 499b), by selling or offering for sale and/or shipping in interstate commerce a misrepresented lot of potatoes, as set forth in Findings of Fact 3 above.

ORDER

Respondent's license is suspended for 14 days, from May 23, 1983 through June 5, 1983.

This order shall become effective May 23, 1983.

The parties hereto have waived their rights to appeal from this order by signing below.

Copies hereof shall be served upon the parties.

(No. 22,567)

In re: WARLEY FRUIT & PRODUCE, INC. PACA Docket No. 2-6102.
Decided February 17, 1983.

Failure to make full payment promptly—Revocation of license—Default

Respondent failed to make full payment promptly for fruits and vegetables purchased in interstate commerce which constitutes willful, repeated and flagrant violations of the Act. Respondent's license was revoked.

Dennis Becker, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

**DECISION AND ORDER
PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on August 30, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March, 1979 through April 1982, respondent purchased and accepted, in interstate and foreign commerce, from 35 sellers, 133 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$189,182.57.

A copy of the complaint was served upon respondent on September 23, 1982, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Warley Fruit & Produce, Inc., is a corporation, whose address is Post Office Box 1129, Mobile, Alabama 36601.

2. Pursuant to the licensing provisions of the Act, license number 810865 was issued to respondent on April 14, 1981, was renewed annually, presently is in effect, and is next subject to renewal on or before April 14, 1983.

3. As more fully set forth in paragraph 6 of the complaint, during the period March, 1979 through April, 1982 respondent purchased and accepted in interstate and foreign commerce from 35 sellers, 133 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$189,182.57.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 133 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final May 25, 1983.—Ed.]

(No. 22,568)

In re: E. C. RUSSELL TOMATO CO., INC. PACA Docket No. 2-6065.
Decided March 2, 1983.

Failure to pay—Publication of the facts—Default

Respondent failed to pay for perishable agricultural commodities purchased in interstate commerce which constitutes willful, flagrant and repeated violations of the Act. The facts and circumstances were ordered to be published.

Andrew Y. Stanton, for complainant
Respondent, *pro se*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) (hereinafter referred to as the "Act"), instituted by a complaint filed on July 15, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1980 through September 1981, respondent purchased and accepted in interstate commerce from 11 sellers 126 lots of perishable agricultural commodities, but failed to make payment of the agreed purchase prices in an amount totalling \$80,999.10.

A copy of the complaint was served upon respondent on October 21, 1982, but respondent has failed to file an answer thereto within the period set forth in section 1.136(a) of the Rules of Practice (7 CFR 1.136(a)). Therefore, the time for filing an answer having run, and upon the motion of complainant for the issuance of a decision, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, E.C. Russell Tomato Co. Inc., is a corporation whose address is 2806 Sherman Avenue, Knoxville, Tennessee 37921.

2. Pursuant to the licensing provisions of the Act, license number 810630 was issued to respondent on March 3, 1981. This license was renewed annually but terminated on March 3, 1982, when respondent failed to pay the required annual license fee (7 U.S.C. 499d(a)).

3. As is more fully set forth in paragraph 5 of the complaint, respondent, during the period October 1980 through September 1981, purchased 126 lots of perishable agricultural commodities from 11 sellers in interstate commerce, but failed to make payment of the agreed purchase prices totalling \$80,999.10.

CONCLUSION

Respondent's failure to pay 11 sellers a total of \$80,999.10 for the purchase of 126 lots of perishable agricultural commodities in the course of interstate commerce, set forth in Finding of Fact 3 above, constitutes willful, flagrant, and repeated violations of section 2 of the Act (7 U.S.C. 499b) for which the order below is issued.

ORDER

A finding is made that respondent, E.C. Russell Tomato Co. Inc., has committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 85 days after receipt thereof unless appealed to the Secretary by a party to the proceedings within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final May 26, 1983.—Ed.]

(No. 22,569)

In re: MILLBROOK, INC. PACA Docket No. 2-6177. Decided March 4, 1983.

Failure to make full payment promptly—Revocation of license—Default

Respondent failed to make full payment promptly for fruit and vegetables purchased in interstate and foreign commerce which constitutes willful, repeated and flagrant violations of the Act. Respondent's license was revoked.

Edward M. Silverstein, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "PACA"), instituted by a complaint filed on December 9, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1981 through December 1981, respondent purchased and accepted, in interstate and foreign commerce, from four sellers, 28 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed

purchase prices or balances thereof in the total amount of \$125,987.53.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Millbrook, Inc., is a corporation, whose address is 55 Millbrook Street, Worcester, Massachusetts 01608.

2. Pursuant to the licensing provisions of the Act, license number 661531 was issued to respondent on December 7, 1965, was renewed annually, and was next subject to renewal on or before December 1981.

3. As more fully set forth in paragraph 5 of the complaint, during the period October 1981 through December 1981 respondent purchased and accepted in interstate and foreign commerce from four sellers, 28 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly to the agreed purchase prices, or balances thereof, in the total amount of \$125,987.53.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 28 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final May 26, 1983.—Ed.]

MISCELLANEOUS ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,570)

In re: SAMUEL SIMON PETRO, d/b/a SAM PETRO PRODUCE. PACA
Docket No. 2-5970. Order issued May 9, 1983.

ORDER DISMISSING APPEAL

On May 3, 1983, respondent filed a petition for appeal of the initial decision filed in this proceeding by Administrative Law Judge John G. Liebert on March 23, 1983. Respondent received service of Judge Liebert's decision on March 28, 1983. Under the Department's Rules of Practice, an appeal is to be filed within "30 days after receiving service of the Judge's decision" (7 C.F.R. §1.145(a)). The Rules further provide that the initial decision filed by an Administrative Law Judge "shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent" (7 C.F.R. §1.142(c)).

The letter from the Hearing Clerk serving the Judge's decision on respondent states:

This Decision will become final without further proceedings 35 days after service hereof unless there is an appeal to the Secretary

In accordance with the applicable rules of practice and procedure, you will have 30 days from the receipt of this notice in which to file with the Hearing Clerk an appeal to the Secretary.

In this case, the initial decision became final and effective on May 2, 1983, which was the same date on which respondent's appeal was mailed. Hence, the decision was final and effective before the appeal was filed. It is settled that the Judicial Officer has no jurisdiction to hear an appeal that is filed after it has become final and effective. *In re Brink*, 41 Agric. Dec. 2146 (1982) (order dismissing appeal), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Mass., Inc.*, 38 Agric. Dec. 379 (1978) (order denying late appeal); *In re Cook*, 39 Agric. Dec. 116 (1978) (order dismissing appeal).

Even if the appeal had been timely filed, however, the case would have been decided against respondent on the merits under numerous settled precedents.

REPARATION DECISIONS

(No. 22,571)

TOM BENGARD RANCH, INC. a/t/a KLEEN HARVEST v. GARDEN STATE FARMS, INC. PACA Docket No. 2-5994. Decided May 4, 1983.

F.O.B. sale—Acceptance—Suitable shipping condition warranty—Damages—Reparation awarded

Complainant sold and shipped two truckloads of lettuce to respondent who received and accepted the shipments. Inspection results showed both loads exceeded good delivery standards, in breach of the suitable shipping condition warranty. Transportation conditions were not abnormal. Therefore respondent suffered some damages. Reparation was awarded.

Andrew Y. Stanton, Presiding Officer.

Thomas Oliveri, Newport Beach, California, for complainant.

Frank V. Charles, Chelsea, Massachusetts, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$9,761.00 in connection with the sale of two truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability to complainant. Respondent also filed a counterclaim in the amount of \$1,067.50 in connection with the subject matter of the complaint. Complainant filed a reply to the counterclaim, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Tom Bengard Ranch, Inc. a/t/a Kleen Harvest, is a corporation whose address is P.O. Box 5156, Salinas, California.

At the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Garden State Farms, Inc., is a corporation whose address is 3655 South Lawrence St., Philadelphia, Pennsylvania. At the time of transactions alleged in the complaint, respondent was licensed under the Act.

3. On June 16, 1981, complainant sold to respondent a truckload of lettuce consisting of 820 cartons of Bardin brand lettuce for \$4.00 per carton, or \$3,280.00, plus .65 per carton cooling, or \$533.00, \$22.50 for a temperature recorder, and \$.15 per carton brokerage, or \$123.00, totalling \$3,958.00, f.o.b. (hereinafter "shipment A"). It was agreed that the lettuce was to be kept at 34°F. during transit. No grade was specified, but good delivery standards were to apply, excluding bruising and/or discoloration following bruising. A confirmation of sale was issued by the broker, Produce Center, Salinas, California, reflecting the contract terms.

4. Shipment A was transported from complainant's place of business, in interstate commerce to respondent's place of business, on board a truck bearing license tag 410375 MO. It arrived at respondent's on Sunday, June 21, 1981.

5. Shipment A was subjected to a federal inspection at 2:15 p.m. on Monday, June 22, 1981, certificate E023891, which revealed as follows, in pertinent part:

MARKET Philadelphia, PA.

DATE June 22, 1981

HOOR 2:15 P.M.

RECEIVER Garden State Farms, Inc.

ADDRESS Philadelphia, PA.

APPLICANT Same

ADDRESS Same

SHIPPER Tom Bengard Ranch, Inc.

ADDRESS Salinas, Calif.

CAR NO. TRAILER LIC. 410375 MO.

KIND Mechanical Refrigerator

WHERE INSPECTED Applicant's Warehouse

Condition of Equipment: Temperature control unit in operation.

Products Inspected: LETTUCE, Iceberg type in fiberboard cartons branded "Bardin, 2 dozen, Tom Bengard Ranch, Inc., Salinas, CA." Applicant's count: 600 cartons.

Condition of Load: Partially unloaded lengthwise and crosswise load. 1-5 rows, 2-7 layers.

Condition of Pack: Tight.

Temperature of Product: Various locations: 40°F. to 41°F.

Size: Fairly uniform.

Quality: Clean, fairly well trimmed, green color. Average 92% hard or firm, 8% fairly firm. Grade defects average 6% consisting of broken midribs and mechanical damage.

Condition: Heads or portion of heads not affected by condition defects are fresh and crisp. *Wrapper leaves*: No decay. *Head leaves*: Ranges 1 to 4 heads in most cartons, none in some, average 9% damage by external Tipburn. Ranges 2 to 6 decayed heads in half of cartons, none in remainder, average 8% Bacterial Soft Rot in various stages.

Grade: Meets quality requirements but fails to grade U.S. No. 1 only account condition.

Remarks: Inspection and certificate restricted to part of 6 stacks nearest rear doors in that portion of load remaining at time of inspection.

6. Subsequent to the inspection, respondent resold the lettuce shipment A as follows: 324 cartons for \$6.50 per carton, \$2,229.50, and 477 cartons for \$6.00 per carton, or \$2,862.00, for total of \$5,091.50.

7. Respondent, to date, has failed to pay complainant any part the contract price for shipment A.

8. The federal-state Market News Service Reports for Philadelphia, Pennsylvania on June 22, 1981, show the selling price of iceberg lettuce from California, size 24's, as \$10.00 to \$11.00 mostly \$10.00 to \$10.50.

9. On approximately June 19, 1981, complainant sold to respondent a truckload of lettuce consisting of 850 cartons of Bengal brand lettuce for \$6.00 per carton, or \$5,100.00, plus \$.65 per carton cooling, or \$552.50, \$22.50 for a temperature recorder, and \$.15 per carton brokerage, or \$127.50, for a total of \$5,802.50, f.o.b. (hereinafter, "shipment B"). It was agreed that the lettuce was to be kept at 34°F. in transit. No grade was specified, but good delivery standards were to apply, excluding bruising and/or discoloration following bruising. The broker, Produce Center, issued a conformation of sale reflecting the contract terms.

10. Shipment B was transported from complainant in interstate commerce to respondent, on board a truck bearing license to FREZ 500516. It arrived at respondent's place of business on June 25, 1981.

11. Shipment B was subjected to a federal inspection at 11:00 a.m. on June 26, 1981, certificate E024008, which revealed as follows, in pertinent part:

MARKET Philadelphia, PA.

DATE June 26, 1981

HOUR 11:00 A.M.

RECEIVER Garden State Farms, Inc.

ADDRESS Philadelphia, Pa.

APPLICANT Same

ADDRESS Same

SHIPPER Tom Bengard Ranch, Inc.

ADDRESS Salinas, Calif.

CAR NO. TRAILER LIC. FREZ 500516

KIND Mechanical Refrigerator

WHERE INSPECTED Applicant's Warehouse

Condition of Equipment: Temperature control unit in operation.

Products Inspected; LETTUCE, Iceberg type in fiberboard cartons branded "Bengard 2 dozen, Tom Bengard Ranch, Inc., Salinas, CA. Applicants count: 800 cartons.

Conditions of Load: Through lengthwise and crosswise load. 5 rows, 8 layers.

Condition of Pack: Tight.

Temperature of Product: Various locations: 41°F. to 42°F.

Size: Fairly uniform.

Quality: Clean, fairly well trimmed, green color. Average 96% hard or firm, 4% fairly firm. Grade defect average 5% consisting of mechanical damage and broken midribs.

Condition: Heads or portion of heads not affected by condition defects are fresh and crisp. *Wrapper leaves*: No decay. *Head leaves*: Ranges 2 to 8 heads in most cartons, none in some, average 19% damage by external Tipburn. No decay.

Grade: Meets quality requirements but fails to grade U.S. No. 1 only account condition.

Remarks: Inspection and certificate restricted to part of 6 stacks nearest rear doors.

12. Subsequent to the inspection, respondent resold the lettuce in shipment B as follows: 209 cartons at \$6.00 per carton, or \$1,254.00, 106 cartons at \$5.00 per carton, or \$530.00, and 174 cartons at \$4.00 per carton, or \$696.00, totalling \$2,480.00.

13. Respondent dumped 361 cartons from either shipment A or shipment B and secured a dump certificate therefor dated July 2, 1981. The dump certificate stated that the lettuce was marked for identification as "Bengard, 2 dozen, Tom Bengard Ranch, Inc., Salinas, CA". The certificate also stated that the lettuce had been inspected on June 22, 1981, reported on federal certificate E023891, and been unloaded from trailer 410375 MO. On October 15, 1981, respondent's representative wrote a letter to the office responsible for preparing the dump certificate and stated that the original certificate had been in error. The letter requested that the certificate be amended to read that the lettuce had previously been inspected on June 26, 1981, reported on federal certificate E024008, and unloaded from trailer FREZ 500516.

14. Respondent, to date, has failed to pay complainant any part of the contract price for shipment B.

15. According to the federal-state Market News Service Reports for Philadelphia, Pennsylvania on June 25, 1981, the selling price of iceberg lettuce from California, size 24's, was \$10.50 to \$11.50, mostly \$11.00, few \$12.00.

16. A formal complaint was filed on December 28, 1981, which was within nine months from the times the alleged causes of action herein accrued. A timely counterclaim relating to the subject matter of the complaint was filed on March 9, 1982.

CONCLUSIONS

The terms of the contracts are not in dispute. Respondent denies that it accepted the lettuce. Respondent further claims that both shipments were in breach of warranty due to condition problems present upon their arrival at its place of business, and states that it notified the broker, Produce Center, Salinas, California, of these problems. Respondent also contends that, with respect to shipment B, it incurred damages in lost profits of \$1,067.50. Complainant denies having committed any breach of warranty, claiming that transportation conditions were abnormal. In addition, complainant disputes the propriety of respondent's resale of both shipments.

Jim Linquist, an employee of Produce Center, has submitted a letter to the Department, which was received on October 15, 1981, in which he states that he first became aware of respondent's complaints regarding shipment A approximately four weeks after the load arrived at respondent's place of business on June 21, 1981. He states that, at that time, respondent told him that it had to dump 361 cartons. Linquist also states that he was notified by respon-

dent's Mike Walsh concerning problems with shipment B, but does not specify when this notification took place.

We do not agree with respondent's claim that it rejected shipment A. Linquist of Produce Center, as a representative of the broker in this proceeding, is presumably free from bias, and the record contains no evidence to the contrary. Therefore, his statement that he was not contacted by respondent until four weeks after respondent received shipment A is highly credible. According to the Department's regulations, 7 CFR 46.2(dd)(3), failure of the consignee to give notice of rejection within a reasonable time, eight hours after arrival of truck shipments of fresh fruit and vegetables (7 CFR 46.2(c)(2)), constitutes acceptance. Therefore, respondent accepted shipment A.

Regarding shipment B, the record is unclear whether respondent's complaints were made in a timely fashion. Even if we assume they were, respondent does not state that it specifically informed complainant or the broker of its desire to reject shipment B. Moreover, Linquist's letter does not indicate that respondent rejected the load, but that respondent only complained about its condition. We have long held that notice of rejection must be in clear, unmistakable terms, and a mere complaint regarding the shipment is insufficient. *Mario Saikhon v. Russell-Ward Co., Inc.*, 34 A.D. 1940 (1975); *Jarson and Zerilli Co., Inc. v. P. Tavilla Co., Inc.*, 30 A.D. 1360 (1971). We thus conclude that respondent accepted shipment B.

Since respondent accepted the two loads of lettuce it became liable to complainant for the full contract price, less damages resulting from any breach of warranty. It is respondent's burden to prove both the breach and damages by a preponderance of the evidence. *Tony Misita & Sons Produce v. Twin City Produce*, 41 A.D. 195 (1982).

Under the terms of the f.o.b. contracts involved herein, complainant gave an implied warranty that the lettuce shipped was in suitable shipping condition. Suitable shipping condition is defined by the regulations (7 CFR 46.43(j)) as meaning that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. *Pleasant Valley Vegetable Co-op v. Robert T. Cochran & Co. Inc.*, 41 A.D. 1208 (1982). According to the regulations (7 CFR 46.44(a)(2)), lettuce with no grade specified, as here, will be considered to have made good delivery without abnormal deterioration if it contains a maximum of 15% condition de-

fects, including not more than 9% serious damage of which there may be a maximum of 5% decay affecting any portion of the head excluding wrapper leaves. The inspection results for shipment A (Finding of Fact 5) show damage to the head leaves of 9% tipburn and 8% bacterial soft rot. The inspection results for shipment B (Finding of Fact 11) show an average of 19% damage by tipburn affecting the head leaves. Both loads exceeded good delivery standards, in breach of the suitable shipping condition warranty.

However, complainant argues that the warranty was inapplicable, as transportation conditions were abnormal. Complainant contends that the pulp temperatures revealed by the inspection reports, 40°F. to 41°F. for shipment A and 41°F. to 42°F. for shipment B, were excessive. In *Merit Packing Co., v. William G. Yokeley d/b/a William Billy Yokeley*, 41 A.D. 1630 (1982), an inspection of a load of lettuce found pulp temperatures of 42°F. to 47°F. We there held that in the absence of a temperature recording tape showing that excessive temperatures had been maintained during transit, the somewhat elevated pulp temperatures did not indicate abnormal transportation conditions. A temperature recording tape was not put into evidence for shipment A. Therefore, we conclude that transportation conditions for shipment A were not abnormal. A temperature recording tape was put into the record for shipment B, which shows that a temperature of just over 35°F. was maintained throughout the period of transit. This temperature was not excessive. Considering that the appropriate temperature was maintained in transit and that shipment B showed only a slight elevation in pulp temperature at the time of inspection, we must conclude that transportation conditions were not abnormal for shipment B as well.

We have determined that respondent has proven a breach of warranty regarding both shipments A and B. We now turn to the question of damages. The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. The value of the accepted goods may be determined by the results of a prompt and proper resale. The value of the goods if they had been as warranted may be determined by reference to the applicable Market News Service Reports listings. *Homestead Tomato Packing Co., Inc. v. Austin J. Merkel Co., Inc.*, 40 A.D. 1587 (1981).

Respondent has submitted accountings showing that shipment A brought \$5,091.50 on resale, and shipment B, \$2,480.00 (Findings of Fact 6 and 12, respectively). Complainant questions the accuracy of respondent's accountings, largely because a dump certificate dated

July 2, 1981, states that the 391 cartons of lettuce dumped were Bengard brand, those of shipment B, but that the lettuce previously had been inspected for grade on June 22, 1981, with the inspection report identified as certificate E023891, apparently referring to shipment A. The dump certificate also states that the respondent applicant had said that the lettuce had been unloaded from trailer 410375 MO, again referring to shipment A. Linquist of Produce Center says, in his October 15, 1981, letter to the Department, that respondent had informed it, four weeks after the delivery of shipment A, that 361 cartons had been dumped from that shipment. Respondent contends that the information originally given by it to the dumping facility was erroneous, and that it later submitted the proper information in a letter dated October 15, 1981. In that letter, respondent states that the lettuce had actually been inspected on June 26, 1981, reported on certificate E024008, and unloaded from trailer FREZ 500518. All these references pertain to shipment B. Although the origin of the dumped cartons, whether they were from shipment A or shipment B, is somewhat unclear due to respondent's inconsistent statements, we do not consider this to be detrimental to the credibility of respondent's accountings. The figures involved in respondent's accounts of sale have been consistently maintained since the filing of respondent's September 18, 1981, response to the informal complaint. We accept these figures as evidence of prompt and proper resales. Therefore, the amount derived from the resales of shipments A and B, \$5,091.50 and \$2,480.00, respectively, constitute the value of the lettuce accepted by respondent.

For the value of shipment A if it had been as warranted we look to the Philadelphia, Pennsylvania Market News Service Reports for the date of delivery. However, since the date of delivery, June 21, 1981, was a Sunday, we look to the listings of June 22, 1981. Those listings give a price for California lettuce of \$10.00 to \$11.00, mostly 10.50. In accordance with our usual practice of utilizing the lowest figure, \$10.00 per carton in this instance, the total for the 820 cartons of shipment A is \$8,200.00. For the value of shipment B we will use the Philadelphia, Pennsylvania Market News Service Reports of the date of delivery, June 25, 1981, which gives a price for California lettuce of \$10.50 to \$11.50, mostly \$11.00, few \$12.00. Using the lowest price of \$10.50 per carton results in \$8,925.00 for the 850 cartons of shipment B.

Respondent's damages for shipment A are thus \$8,200.00 less \$5,091.50, or \$3,108.50. Respondent's damages for shipment B are \$8,925.00 less \$2,480.00, or \$6,445.00. Although incidental damages may also be recoverable, respondent has failed to claim any. The

contract price for shipment A was \$3,958.50. Subtracting from the sum respondent's damages of \$3,108.50 results in \$850.00 owed respondent to complainant for shipment A. The contract price for shipment B was \$5,802.50. Respondent's damages of \$6,445.00 exceed the contract price by \$642.50. Respondent has filed a counterclaim for \$1,067.50 as its damages resulting from complainant's breach of warranty regarding shipment B. Since respondent's damages for shipment B are \$642.50 greater than the contract price, this sum will be awarded to respondent regarding shipment B. See *Tony Misita & Sons Produce v. Twin City Produce, supra*. Complainant's damages from shipment A of \$850.00 less respondent's damages of \$642.50 from shipment B result in net damages to complainant of \$207.50. Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$207.50, with interest thereon at a rate of 13 percent per annum from August 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,572)

CARL DOBLER & SONS v. PALERMO & CASCIO, INC. PACA Dock No. 2-6020. Decided May 4, 1983.

Existence of contract—Complaint dismissed

Complainant shipped six partial truckloads of lettuce to respondent who received and accepted the shipments. Complainant alleges that it has not been paid for the first five partial truckloads of lettuce and that another firm, to which respondent made payment in full, was only acting as a broker. Complainant failed to prove by preponderance of the evidence that a contract of sale ever existed between it and respondent. The complaint was dismissed.

George S. Whitten, presiding officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Justin J. Johl, Kansas City, Missouri, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$10,806.60, in connection with the alleged sale of 6 loads of lettuce in interstate commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed as damages in the formal complaint does not exceed \$15,000.00 and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is therefore applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant did not file a statement in reply. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Carl F. Dobler and Ken W. Dobler doing business as Carl Dobler & Sons, whose address is 174 Struve Road, Watsonville, California.

2. Respondent, Palermo & Cascio, Inc., is a corporation whose address is 301 Walnut Street, Kansas City, Missouri. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 14, 18, 23, 28, September 1, and October 12, 1981, complainant shipped to respondent partial truckloads of lettuce. The trucks were loaded with the lettuce at complainant's place of business in Salinas, California, and, after being loaded with other mixed perishable produce at undetermined shipping points, proceeded to respondent's place of business in Kansas City, Missouri, where the lettuce and other produce were delivered.

4. Respondent has paid Western Mixt Produce Co., of Salinas, California, for each of the first 5 partial loads of lettuce. As to the last partial load of lettuce, shipped on October 12, 1981, respondent

has paid complainant \$1,985.60 of the claimed original \$2,529.60 invoice price applicable to such lettuce, and complainant has accepted such payment in full settlement as to the October 12, 1982, load.

5. The formal complaint was filed on March 15, 1982, which was within 9 months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant alleges the sale of the 6 partial truckloads of lettuce to respondent for invoice prices totaling \$12,792.20. Complainant attached as exhibits to its complaint copies of invoices covering each of the partial truckloads of lettuce showing the lettuce as sold to respondent in Kansas City, Missouri, on a f.o.b. basis. Complainant also attached, as to each partial truckload, copies of bills of lading covering the lettuce which show that the lettuce was to be shipped from complainant's place of business in Salinas, California, to respondent in Kansas City, Missouri. Complainant's Carl Dobler stated in the sworn complaint that the contract between complainant and respondent was negotiated by Western Mixt Produce, a broker located at Salinas, California. As its opening statement complainant submitted the affidavit of Mr. Sam McMurry, Sales Manager, who stated in part as follows:

In November 1981 I contacted Palermo & Cascio, Inc. direct to advise them that these accounts were getting way past due and I was expecting payment. At that time Palermo & Cascio, Inc. advised me that the monies stemming from the seven shipments [the complaint as to one of the shipments was subsequently dropped by complainant when respondent paid complainant for such shipment in the full amount claimed by complainant] had all gone direct to Western Mixt Produce Company, the broker in this transaction. However, at no time did I ever advise Palermo & Cascio to remit to Western Mixt Produce. There was never any agreement made between myself, Palermo & Cascio or Western Mixt Produce. I was expecting all proceeds to come directly to me from Palermo & Cascio. As far as I was concerned at all times Western Mixt Produce Company was acting strictly as a broker and Carl Dobler & Son's contract existed solely and exclusively with Palermo & Cascio.

Respondent denies that it purchased any of the lettuce from complainant and states that its contract rather was with Western Mixt Produce Company. Respondent states that it has paid Western Mixt Produce Company in full for the first 5 partial truckloads of lettuce and has submitted copies of the invoices which it received from Western Mixt Produce and checks made out to Western Mixt Pro-

duce which it claims were in payment for such invoices. The invoices which respondent received from Western Mixt Produce in each case are for a variety of mixed produce, but in each case include the exact number of cartons of lettuce at the same sizes as the lettuce listed in the invoices submitted by complainant. The amounts of the checks submitted by respondent exactly equal the total amounts on the Western Mixt Produce invoices, except that one of the checks is for a greater amount than the total of two of the invoices. It is clear that respondent made a payment to complainant, in November of 1981, for the October 12, 1981, shipment of lettuce and also for another shipment of lettuce from complainant which is not the subject of this proceeding after respondent became aware of complainant's claim that complainant, instead of Western Mixt Produce Company, was entitled to payment.

The basic question for decision in this proceeding is whether there ever existed a contract of sale relative to the lettuce between complainant and respondent. There are several factors that have led us to the conclusion that complainant has failed to meet its burden of proving by a preponderance of the evidence that there existed a contract of sale between it and respondent. First, complainant never alleges that it had any direct dealings with respondent relative to the lettuce prior to the contacts which were made with respondent in November of 1981, after all of the lettuce had been shipped and complainant first became concerned because it had not received payment. Second, although complainant strongly contends that respondent should be bound by the invoices, copies of which were attached to the complaint, because respondent never protested such invoices, at no point did complainant submit sworn testimony by the person who placed the invoices in the mail to respondent. While complainant's sales manager stated several times in the sworn opening statement that the invoices were mailed by complainant to respondent, there was no allegation that such sales manager was the person who mailed the invoices, and consequently there is no statement in the record from complainant which would prove such mailing. This is especially significant in light of the fact that respondent has submitted as its answering statement an affidavit by its vice president, Harry Defeo, stating that no correspondence or invoices were received from complainant during August, September, or October of 1981, and that it was only in November of 1981, after Western Mixt Produce had been paid for the first 5 partial shipments of lettuce, that Mr. Defeo had any contact with Sam McMurphy. Mr. Defeo states plainly that: "Prior to that November date I was never contacted by anyone with Carl Dobler

& Sons or by Sam McMurry with respect to any alleged delinquent account which respondent had for the delivery of any lettuce produce." See *Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 A.D. 87 (1977) and McCormick, *Evidence*, Section 1.1 (1954). Third, at no point in this proceeding did complainant submit copies of any memoranda of sale issued by Western Mixt Produce Co., nor did complainant maintain that any such memoranda were issued. The absence of such memoranda is inconsistent with Western Mixt Produce Co. having acted as a broker relative to the lettuce.

As we have before stated complainant has failed to prove by preponderance of the evidence the existence of a contract with respondent. Accordingly, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,573)

UNION SALES, INC. v. HARRY L. WOODWARD d/b/a WOODWARD PRODUCE Co. PACA Docket No. 2-6024. Decided May 4, 1983.

F.O.B. sale—Acceptance—Rejection, failure to give timely notice—Reparation awarded.

Complainant sold and shipped to respondent one truckload of onions on an F.O.B. basis. Respondent received the shipment but failed to give complainant notice of rejection within a reasonable time which constituted acceptance. Respondent failed to prove any breach of warranty by complainant. Therefore respondent is liable for contract price. Reparation was awarded to complainant.

Andrew Y. Stanton, presiding officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) in which a timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,691.25 in connection with the sale and shipment of onions to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to file additional evidence in the form of verified statements and to submit briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Onion Sales, Inc., is a corporation whose address is 8282 Moberly Lane, Dallas, Texas.

2. Respondent, Harry L. Woodward d/b/a Woodward Produce Co., is an individual, whose address is 7120 Madison Street, Huntsville, Alabama. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately November 25, 1981, complainant sold to respondent a truckload of onions on an f.o.b. basis, consisting of five sacks of Jumbo Red onions at \$6.50 per sack, 100 sacks of Large Medium yellow onions at \$7.85 per sack, 75 sacks of Jumbo Yellow onions at \$9.25 per sack, 15 sacks of Medium White onions at \$9.00 per sack, and nine sacks of Medium Red onions at \$5.00 per sack, for a total contract price of \$1,691.25. All onions were to be U.S. No. 1.

4. On approximately November 25, 1981, complainant shipped the onions to respondent, on board a truck operated by Raft Trucking Company, Florida City, Florida.

5. When the truck arrived at respondent's place of business on approximately November 27, 1981, the truckdriver handed respondent a "Confirmation of Purchase and Sale" prepared by complainant, reflecting the contract specifications referred to in Findings of Fact 3.

6. Respondent, without securing a federal or state inspection of the onions, or notifying complainant, turned them over to Raft Trucking, which disposed of them. Respondent informed complainant of its purported rejection and disposition of the onions several days later.

7. Respondent, to date, has failed to pay complainant any part of the \$1,691.25 contract price.

8. A formal complaint was filed on March 22, 1982, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

It is agreed that complainant sold and shipped to respondent a truckload of onions for a total contract price of \$1,691.25. According to complainant's "Confirmation of Purchase and Sale", delivered to respondent by the carrier, Raft Trucking, Florida City, Florida, the onions were to be U.S. No. 1 grade. That document also indicates the existence of f.o.b. terms. See Findings of Fact 5. According to respondent, the onions did not make U.S. No. 1 grade upon arrival. Respondent claims that, after trying unsuccessfully to contact complainant, it turned the onions over to Raft Trucking, which disposed of them.

Respondent is alleging a rejection of the onions. However, respondent admits that it failed to inform complainant of its desire to reject until several days after delivery. Failure of a consignee to give notice of rejection within a reasonable time, 8 hours after the delivery of fresh produce by truck (7 CFR 46.2(cc)(2)), as was the case here, constitutes acceptance (7 CFR (dd)(3)). Therefore, respondent accepted the onions.

Having accepted the onions in the f.o.b. sale, it was respondent's duty to pay the contract price, less damages due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 A.D. 1359 (1979). However, respondent has submitted no proof of breach other than its own assertions which, since they are self-serving, carry little weight. Therefore, we must conclude that respondent is liable for the contract price of \$1,691.25.

It should be noted that even if respondent had properly notified complainant of its rejection of the onions, such rejection would have been without reasonable cause, because of the absence of any credible evidence that the onions did not meet contract specifications. See 7 CFR 46.2(bb)(2). Under these circumstances, respondent would still be liable for the contract price, less any proceeds obtained by complainant as a result of resale. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest v. Prevor-Mayrsohn International, Inc.*, 40 A.D. 1781 (1981).

Respondent's failure to pay complainant \$1,691.25 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,691.25, with interest thereon at the rate of 13% per annum from January 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,574)

STONOCA FARMS CORPORATION v. S & S PRODUCE INC. PACA
Docket No. 2-6027. Decided May 4, 1983.

F.O.B. sale—Acceptance—Breach of warranty, failure to prove—Counterclaim dismissed—Reparation awarded

Complainant sold three truckloads of tomatoes to respondent. Two truckloads were shipped to respondent (lots "A" and "B") who received and accepted them. The order for the third truckload (lot "C") was cancelled.

With respect to lot A it is concluded that the size of the allowance admittedly granted by complainant to respondent is as respondent has stated. Therefore respondent is without liability to complainant for anything above the amount already remitted for lot A.

As to lot B, respondent accepted the shipment by unloading the truck and failed to prove any breach of warranty. Therefore respondent is liable to complainant for the full contract price. Respondent's counterclaim is dismissed.

In regard to lot C, it is concluded that complainant agreed to the cancellation of the order. Therefore respondent is not liable to complainant for anything with respect to that transaction.

Reparation was awarded to complainant for lot B only

Andrew Y. Stanton, presiding officer.

Complainant, *pro se*

Leroy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$9,909.60 in connection with three lots of tomatoes sold to respondent in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability. Respondent also filed a counterclaim in the amount of \$4,223.50 in connection with the subject matter of the complaint. Complainant filed a reply to the counterclaim, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, respondent filed an answering statement and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Stonoca Farms Corporation, is a corporation whose address is P.O. Box 68, Johns Island, South Carolina. At the time of the transactions alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, S&S Produce Inc., is a corporation whose address is 4606 Butterfield Road, Hillside, Illinois. At the time of the transactions alleged in the complaint, respondent was licensed under the Act.

3. On June 16, 1981, complainant, by oral contract, sold to respondent one truckload of tomatoes, U.S. Combination and U.S. Two's, for a total of \$7,616.00, f.o.b. (hereinafter, "lot A"). It was agreed that the tomatoes would be gassed and that a 60°F. transit temperature would be maintained. The contract was negotiated by Ernest Valencia, Nogales, Arizona, who acted as the broker throughout the transaction.

4. On June 19, 1981, complainant shipped lot A from its place of business, in interstate commerce, to respondent, who accepted it.

5. On June 23, 1981, after phone calls had taken place between complainant and Valencia, respondent and Valencia, and complainant and respondent, the parties agreed that respondent would be allowed a \$.50 per carton allowance on lot A, or \$640.00.

6. Respondent has, to date, paid to complainant \$6,976.00 for a lot A, which is \$320.00 less than what complainant claims to be due and owing (after allowing a \$320.00 adjustment to respondent).

7. On June 22, 1981, complainant, by oral contract, acting through Valencia, sold to respondent one truckload of tomatoes, U.S. Combination and U.S. Two's, for a total of \$7,349.60, f.o.b. (hereinafter, "lot B"). It was agreed that the tomatoes would be gassed and that a 54°F. transit temperature would be maintained.

8. On June 25, 1981, complainant shipped lot B from its place of business, in interstate commerce, to that of respondent. The tomatoes were gassed while on board the truck. The truck arrived at respondent's place of business on June 26, 1981, and was unloaded.

9. Respondent secured a federal inspection of lot B on June 26, 1981, at 2:30 p.m., which revealed as follows, in pertinent part:

Products Inspected:	TOMATOES in cartons printed "Very Best Stonoca Farms Corp., John's Island, So. Carolina, 30 Lbs. Net Wt." and stamped "6×6" or "5×6". Applicant states lot consist of 1356 cartons.
Condition Load:	Stacked on pallets in applicant's store.
Condition of Pack:	Well filled. Jumble pack.
Temperature of Product:	In various locations 65° to 70°F.
Size:	Meets Florida Marketing Order size requirements as stamped.
Quality:	Clean, well developed, mostly smooth, some fairly smooth, mostly well, some fairly well formed. Grade defects range 12 to 18%, average 16%, consisting of misshapen and scars.
Condition:	Average approximately 35% green and breakers, 60% turning and pink. Average 3% decay. Damage by sunken discolored areas average 1%. Damage by bruising average 1%.
Grade:	Fails to grade U.S. No. 1, account of grade defects.

10. On June 30, 1981, at 8:20 a.m., respondent secured a second inspection of lot B, which revealed as follows, in pertinent part:

Products Inspected:	TOMATOES in cartons printed "Very Best, Stonoca Farms Corp., John's Island So. Carolina, 30 Lbs. Net Wt." and stamped "6×6" or "5×6". Applicant states consists of 850 cartons.
Condition of Load:	Stacked on pallets in applicant's warehouse.
Condition of Pack:	Each lot: Well filled, jumbo packed.
Temperature of Product:	In various locations 65° to 66°F.
Condition:	Average approximately 75% light red to red. Decay ranges from 2 to 60%, average 27%, Watery Soft Rot and Gray Mold Rot, generally in advanced stages. Damage by sunken discolored areas ranges from 2 to 6%, average 4%, generally occurring over shoulders.

11. After the June 30, 1981, inspection, respondent disposed of the tomatoes of lot B.

12. Respondent has, to date, failed to pay complainant any part of the \$7,349.60 which complainant claims to be due and owing for lot B.

13. On approximately June 25, 1981, complainant, by oral contract, acting through Valencia, sold to respondent a truckload of tomatoes, U.S. Combination and U.S. Two's, for a total of \$7,872.00, f.o.b. (hereinafter, "lot C"). It was agreed that the tomatoes would be gassed and a 58°F. transit temperature would be maintained.

14. On the morning of June 26, 1981, Valencia met with complainant's representative, Craig Campbell, and told him that respondent wished to cancel its order for lot C. Campbell agreed to the cancellation.

15. Complainant resold the tomatoes of lot C to Ray & Mascari, Inc., Indianapolis, Indiana for \$5,632.00. Respondent has, to date, failed to pay complainant the difference between the contract price of \$7,872.00 and the \$5,632.00 obtained by complainant on resale, or \$2,240.00.

16. A formal complaint was filed on January 25, 1982, which was within nine months from the time the alleged causes of action herein accrued.

17. A timely counterclaim was filed on April 27, 1982, in connection with the transactions alleged in the complaint.

CONCLUSIONS

Complainant sold three lots of tomatoes to respondent for \$7,616.00 (lot A), \$7,349.60 (lot B), and \$7,872.00 (lot C). Complainant claims that respondent failed to pay \$320.00 for lot A, the contract price less a \$320.00 allowance, minus the amount remitted by respondent. Complainant further claims that respondent failed to pay the entire contract price for lot B. As to lot C, complainant contends that respondent wrongfully cancelled its order, after which complainant resold the tomatoes for \$5,632.00, \$2,240.00 less than its contract price with respondent. Complainant thus claims damages of \$320.00 for lot A, \$7,349.60 for lot B, and \$2,240.00 for lot C, a total of \$9,990.60.

Respondent alleges that complainant agreed to an allowance of \$640.00 for lot A, not the \$320.00 which complainant claims. Respondent contends that lot B was in poor condition when delivered and had not been properly gassed and loaded. Respondent alleges that it sold lot B for \$5,620.50, resulting in lost profits of \$4,223.50, which amount respondent claims as damages in its counterclaim. With respect to lot C, respondent contends that the broker, Valencia, told complainant's employee, Craig Campbell, that respondent desired to cancel the load, and Campbell agreed to the cancellation.

With respect to lot A, the parties disagree as to the size of the allowance which was admittedly granted by complainant. To support its claim that only \$320.00 was granted, complainant points to a July 27, 1981, telegram to respondent by complainant's employee, Tommy Campbell, in which Campbell states that only a \$.25 per flat allowance totalling \$320.00 was granted. However, respondent has submitted the affidavit of the broker, Valencia, as part of its opening statement. Valencia states that on June 23, 1981, he, respondent's Mr. Sansome, and complainant's Mr. DiMare, agreed to a \$.50 per flat, or \$640.00, allowance for lot A. Valencia, as the broker, has no stake in the outcome of this proceeding, which gives his version of events substantial credibility. Based on Valencia's sworn statement, we conclude that complainant granted respondent a \$640.00 allowance for lot A. Therefore, respondent is without liability to complainant for anything above the amount already remitted for lot A.

Turning to lot B, the June 26, 1981, inspection report (Finding of Fact 9) reveals that respondent unloaded the truck. By so doing, respondent accepted the tomatoes. *Mario Saikhon v. Russell-Ward Company Inc.*, 34 A.D. 1940 (1975). Having accepted the tomatoes in this f.o.b. transaction, respondent became liable for the contract price less damages due to any breach of warranty by complainant. Respondent is obligated to prove by a preponderance of the evidence both the breach and damages. *Arkansas Tomato Co. v. Anthony M. Arena d/b/a Arena Produce Co. and Central Marketing Associates, Inc.*, 41 A.D. 310 (1982). The June 26, 1981, inspection report does not show any breach of warranty. The finding of an average of 3% decay, 1% damage by sunken and discolored areas, and 1% bruising, are within tolerance for tomatoes. In addition, the 65°F to 70°F temperature of the tomatoes indicates that conditions at respondent's warehouse could have contributed to the amount of deterioration present. The condition of the tomatoes as described by the June 30, 1981, inspection report (Finding of Fact 10) is not relevant since that inspection covered only about two-thirds of lot B, and occurred after the tomatoes had been stored in respondent's warehouse for four days. Thus, the results of the second inspection can hardly be considered indicative of the condition of the lot B at the time of delivery on July 26, 1981. It is irrelevant that the tomatoes failed to grade U.S. No. 1, as the contract for lot B provided for a mixture of U.S. Combination Grade and U.S. No. Two's. Respondent's contention that the tomatoes were not gassed is not supported by the June 26, 1981, inspection report. If no gassing had occurred, 60% of the tomatoes would not have been described as "turning and pink." We thus accept complainant's claim that lot B was gassed in transit on board the truck. Respondent's contention that the tomatoes were improperly packed is not borne out by the June 26, 1981, inspection report. Therefore, respondent has failed to prove any breach by complainant. Consequently, respondent is liable to complainant for the contract price of \$7,349.60. In the absence of any breach of contract there is no basis for respondent's counterclaim, and it must be dismissed.

Respondent's allegation that lot C was cancelled with the mutual agreement of the parties is corroborated by Valencia's affidavit in complainant's opening statement. Valencia states that, after respondent told him on June 26, 1981, to cancel the order for lot C, he personally met with complainant's Craig Campbell and informed him of respondent's request to cancel, to which Campbell agreed. Complainant's representative, Paul DiMare, asserts in an affidavit submitted by complainant as its statement in reply, that no cancel

lation of lot C ever took place. However, complainant's Campbell, who respondent and Valencia both allege was complainant's representative when the cancellation issue was discussed, has not submitted any statement regarding the alleged cancellation. Since the affidavit of Valencia, the broker, is entitled to great weight, as previously mentioned, and Craig Campbell, the representative of complainant who respondent and Valencia claim gave complainant's consent to the cancellation of lot C, has not come forward with any statement on this issue, we conclude that complainant agreed to cancel lot C. Respondent is thus without liability with respect to that transaction.

We have concluded that respondent is not liable for lots A and C, but owes complainant \$7,349.60 for lot B. We have also determined that respondent's counterclaim regarding lot B should be dismissed. Respondent's failure to pay complainant \$7,349.60 for lot B is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$7,349.60, with interest thereon at the rate of 13% per annum from August 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,575)

THOMPSON SALES CO., INC. v. BENNY MANDELL PRODUCE, INC.
PACA Docket No. 2-6103. Decided May 4, 1983.

F.O.B. sale—Breach of contract—Damages—Delivered sale—Damages, failure to prove—Reparation awarded

Respondent purchased a truckload of tomatoes from complainant on an F.O.B. basis through a broker. However, complainant shipped the load of tomatoes to another customer because it was claimed that no transportation was available. When respondent was informed that the first order was shipped to another party, he agreed to purchase another load of tomatoes on a delivered basis, at a higher price than the first order. Respondent received and accepted the tomatoes on the second contract. Complainant breached its contractual obligation in regard to the first contract by reselling the load of tomatoes manifested to respondent without giving respondent an opportunity to rearrange transportation. Respondent was awarded damages for non-delivery by the seller. As to the second contract, respondent failed to prove damages in regard to color and number of cartons shipped per size but was entitled to an adjustment due to short-weighting. Reparation was awarded to complainant.

Edward M. Silverstein, presiding officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent, in the amount of \$1,547.85, in connection with one truckload of tomatoes shipped in interstate commerce.

A copy of the Department's report of investigation was served on both parties. Also, respondent was served with a copy of the formal complaint and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement and respondent an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Thompson Sales Co., Inc., is a corporation whose mailing address is P.O. Box 598, Belle Glade, Florida 33430.

2. Respondent, Benny Mandell Produce, Inc., is a corporation whose mailing address is Mehring Way and Plum Street, Cincinnati, Ohio 45202. At all material times, respondent was licensed under the Act.

3. On or about March 27, 1982, respondent purchased 720 cartons of tomatoes from complainant as follows: 505 cartons Florida Gassed Green Tomatoes 25# 5×6's at \$6.25 f.o.b., and 215 cartons Florida Gassed Green Tomatoes 25# 6×6's at \$5.25 f.o.b., for a total f.o.b. price of \$4,285.00. Transportation was arranged at an additional \$1.25 per carton (\$900). The sale was brokered by Mr. Larry DeWees of the C.H. Robinson Company, 801 Linn Street, Cincinnati, Ohio. At 2:30 p.m., on Saturday, March 27, 1982, the broker was informed by complainant that no truck was available. On Sunday, March 28, 1982, at 8:00 a.m., Mr. DeWees informed respondent about the transportation problem. On Monday, March 29, 1982, complainant informed Mr. DeWees that it had shipped the to-

matatoes to another customer on March 27, 1982. Complainant also informed Mr. DeWees that it would not refill the order on the same terms, and that the price would have to be \$8.40 delivered on the 5x6's, and \$6.40 delivered on the 6x6's, with a manifest of 350 of each. Upon being informed of the complainant's demands by Mr. DeWees, the respondent agreed to them. Both parties to the contract were aware that the tomatoes were to be "pink to light pink." Complainant was able to arrange shipping at \$1.10 per carton. This was a new contract. The parties never treated this as a renegotiation, but rather as a new contract.

4. On or about March 30, 1982, C. H. Robinson Company issued a Brokers Standard Memorandum of Sale which listed a shipping date of March 27, 1982, beneath which was printed "SUBJECT TO TRUCK", a load number of 011-2-11962, and which listed the terms of sale as follows:

				ONE LTL 85% OR BETTER	
				USONE FLORIDA GASED	
				GREEN TOMATOES	
				PACKED IN NEW	
				BRANDED CARTONS	
BUYER MANDELL PRODUCE INC., BENNY CINCINNATI OH					
TERMS FOB				SHIPPER INVOICE	
505	CTN	TOMATOES FLA. 5x6's	25#	GASED GREEN	6.25
215	CTN	TOMATOES FLA. 6x6's	25#	GASED GREEN	5.25

5. Also, on or about March 30, 1982, after receiving the truck manifest from complainant, C.H. Robinson Company issued a "CORRECTED CONFIRMATION" Brokers Standard Memorandum of Sale which erroneously listed a shipping date of March 27, 1982, erroneously listed a load number of 011-2-11962, and also listed the terms of sale as follows:

				ONE LTL 85% OR BETER USONE	
				FLORIDA GASED GREEN TOMA-	
				TOES PACKED IN NEW	
				BRANDED CARTONS	
BUYER MANDELL PRODUCE INC., BENNY CINCINNATI OH					
TERMS DELIVERED				SHIPPER INVOICE	
250	CTN	TOMATOES FLA. 5x6's	25#	GASED GREEN	8.40
450	CTN	TOMATOES FLA. 6x6's	25#	GASED GREEN	5.80

It is noted that the load was not shipped until March 30, 1982, and that the load number listed on this "Corrected" Memorandum was the same, 011-2-11962, as that listed on the previous Memorandum

which load had been diverted to another buyer by complainant. Also, it is noted that the agreement between the parties called for a manifest of 350 5×6's and 350 6×6's, rather than 250 5×6's and 450 6×6's.

6. On March 30, 1982, the load of tomatoes described in the "CORRECTED CONFIRMATION", which is enumerated in paragraph 5, above, was inspected by a Federal inspector. They were graded as "US Comb."

7. The tomatoes described in paragraph 5 above were shipped on March 30, 1982, and arrived at respondent's location on April 1, 1982. At 8:00 a.m. of that day, the tomatoes were made the subject of a Federal inspection which was limited to temperature and condition. Inspection certificate No. E 121994 was issued. It is reflected there that the temperature of the product was "55 to 58°F," and the condition is listed as follows:

5×6 lot: Average approximately 35% green to breakers, 55% turning to pink and 10% light red to red. Average 1% decay. In most samples from 4 to 18%, insome [sic] none, average 7% damage by sunken discolored areas. 6×6 lot: Average 10% green to breakers, 20% turning to pink and 70% bright red to red. Average 1% decay. Average 3% damage by bruising. Average 3% damage by sunken discolored areas.

8. Immediately after the inspection, respondent protested the color of the 6×6 tomatoes as well as their weight to the broker which promptly conveyed these complaints to complainant. Complainant denied that there was a problem with the tomatoes, but authorized a 50 cent per carton allowance on the 450 cartons of 6×6 tomatoes because of the alleged short weight. In addition, the broker declined its 10 cents per carton charge on them and, therefore, the price for the 450 cartons of 6×6 tomatoes was reduced from \$6.40 to \$5.80 per carton. A Brokers Memorandum was issued by Mr. DeWees to that effect, and was received by each of the parties.

9. Respondent accepted the adjustment, but still protested the variances between the two contracts.

10. Respondent made a profit on these tomatoes, and has paid complainant \$3,207.15 with respect to this shipment.

11. A formal complaint was filed on July 15, 1982, which was within nine months of when the cause of action stated herein accrued.

CONCLUSIONS

There were two separate transactions involved in this matter. First, the parties agreed to a sale of 505 cartons of 5×6 tomatoes at

\$6.25 f.o.b. (\$3,156.25) and 215 cartons of 6×6 tomatoes at \$5.25 f.o.b. (\$1128.75) for a total f.o.b. price of \$4,285. Transportation was to be priced at \$1.25 per carton (\$900). The second agreement was for the delivered sale of 350 cartons of 5×6 tomatoes at \$8.40, and 350 cartons of 6×6 tomatoes at \$6.40. Complainant shipped 250 cartons of 5×6's and 450 cartons of 6×6's and invoiced respondent for a total delivered price of \$4,980.00. This later was reduced to \$4,710.00 as a consequence of the \$.60 per carton credit granted for alleged short-weighting as is noted in Finding of Fact 8 above.

Respondent admits receiving and accepting the load of tomatoes shipped by complainant on the second contract. It is therefore, obligated to complainant for the agreed contract price less adjustments granted, money paid, and damages resulting from any breach of contract committed by complainant. Respondent has the burden of proof on all these matters.

As to breaches of contract, respondent alleges the following: (1) complainant breached its first contract by selling the load before respondent could rearrange transportation; and (2) complainant breached its second contract by (a) not shipping 350 cartons of each of the two sizes, (b) shipping the wrong color, and (c) by short-weighting the cartons. We separately deal with each of these alleged breaches below.

As to the first contract, we hold that complainant did breach its contractual obligations by reselling the load of tomatoes manifested to respondent to someone else without giving respondent an opportunity to rearrange transportation. Complainant's defense on this matter rests solely on the following statement on the Brokers' Memorandum: "SUBJECT TO TRUCK." Its argument is that because the specific truck which was supposed to pick up the load was not able to do so, the contract was voided. However, since the Memorandum was not issued until March 30, 1982, which was after the breach, and since it is not clear to us that a particular truck's availability was being made a condition of the sale, we cannot support complainant's position.¹ Since respondent was not notified of the truck's unavailability until Sunday morning, March 28, 1982, after complainant had resold the manifested load on the same day as the sale to respondent (March 27, 1982), and had no opportunity to rearrange transportation, we must hold that complainant breached its contract. The measure of damages for non-delivery by the seller is the difference between the market price at the time when the

¹ The contractual arrangement which was entered into on March 30, 1982, was not a renegotiation.

buyer learned of the breach and the contract price. U.C.C. §2-713; *Kaleel v. Bonanza*, 32 Agric. Dec. 1164 (1973). The contract price was \$6.25 f.o.b. plus \$1.25 shipping for the 5×6 tomatoes, or a delivered price of \$7.50, and \$5.25 f.o.b. plus \$1.25 shipping for the 6×6 tomatoes, or a delivered price of \$6.50. We accept the prices agreed upon between the parties on the second contract as the market price at the time when respondent learned of complainant's breach. Thus the market price on the 5×6's was \$8.40 delivered and \$6.40 delivered on the 6×6's. Respondent's damages on this breach, therefore, are 90 cents per carton on the 505 cartons of 6×6's (\$454.50). However, the market price on the 5×6's was 10 cents less per carton or \$21.50, making respondent's damages on complainant's breach \$433.00.

As to the second contract, we find that respondent has failed to prove damages. Thus, even were we to hold that complainant breached the parties' contract with regard to color and the number of cartons shipped per size, since respondent failed to prove damages due to these alleged breaches, we would still rule in complainant's favor on the ultimate issue of damages. However, it is clear that respondent is entitled to an adjustment of 60 cents per carton for the 450 cartons of 6×6's due to short-weighting as agreed upon between the parties.

Respondent is, therefore, obligated to complainant in the amount of \$4,980 less damages of \$433, an adjustment granted of \$270, and less its payment of \$3,207.15, or \$1,069.85. We find that respondent's failure to pay complainant \$1,069.85 is a violation of section 2 of the Act for which reparation, plus interest, should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$1,069.85, with interest thereon at the rate of 13% per annum from May 1, 1982, until paid.

Copies of this order shall be served on the parties.

(No. 22,576)

ARENA PRODUCE COMPANY, INC. v. T&S TOMATO CO. PACA Docket No. 2-6226. Decided May 5, 1983.

Payment of undisputed amount

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on September 7, 1982, and a formal complaint was filed on December 17, 1982. Complainant seeks to recover \$5,012.25 which amount is alleged to be the unpaid purchase price for produce sold to and accepted by respondent. Respondent filed an answer to the formal complaint on February 28, 1983, admitting that \$4,991.22 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$4,991.22. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

(No. 22,577)

WEST VALLEY PRODUCE v. GREEN MOUNTAIN PRODUCE, INC. PACA
Docket No. 2-6229. Decided May 5, 1983.

Admission of liability

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,429.75 in connection with a shipment of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, West Valley Produce is a corporation whose address is 1600 E. 7th Place, Los Angeles, California 90021. Respondent, Green Mountain Produce, Inc., is a corporation whose address is Box 614, Barre, Vermont 05641. At the time of the transaction involved herein, respondent was licensed or subject to license under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,429.75. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,429.75, with interest thereon at the rate of 18 percent per annum from May 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,578)

SOUZA BROS. PACKING CO. *v.* RALPH E. NEELY PRODUCE CO., INC.
PACA Docket No. 2-6242. Decided May 12, 1983.

Admission of liability

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$844.03 in connection with 2 shipments of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly,

The issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Souza Bros. Packing Co. is a corporation whose address is P.O. Box 405, Santa Maria, California 93456. Respondent, Ralph E. Neely Produce Co., is a corporation whose address is P.O. Box 2001, Savannah, Georgia 31408. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$844.03. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$844.03, with interest thereon at the rate of 13 percent per annum from October 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,579)

SAN JOAQUIN TOMATO GROWERS, INC. v. NETWORK BROKERAGE, INC. PACA Docket No. 2-6247. Decided May 25, 1983.

Admission of liability

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$9,408.70 in connection with 4 shipments of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, San Joaquin Tomato Growers, Inc. is a corporation whose address is P.O. Box 8187, Stockton, California 95208. Respondent, Network Brokerage, Inc., is a corporation whose address

is 63 South Water Market, Chicago, Illinois 60608. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$9,408.70. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$9,408.70, with interest thereon at the rate of 13 percent per annum from October 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,580)

ROBERT SWIFT & CO., INC. *v.* DEBRUYN PRODUCE CO. PACA
Docket No. 2-5995. Decided June 8, 1983.

Brokerage amount due—Produce purchased by broker—Reparation awarded

Complainant, acting as a broker, negotiated the sale of various amounts of perishable produce from respondent to numerous buyers, thus earning brokerage on such transactions. Complainant has shown that the correct amount due from respondent as brokerage is as claimed. It is determined that complainant purchased two shipments of produce from respondent rather than having brokered the sales. The amounts due respondent on these two sales subtracted from the brokerage due complainant results in a net amount due complainant as reparation. Reparation was awarded.

George S. Whitten, presiding officer.

Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,805.50 in connection with numerous transactions involving perishable produce shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto in effect

admitting liability to complainant in the amount of \$1,159.70 and denying liability for the remaining amount. Since respondent made payment of the \$1,159.70 contingent upon dismissal of the complaint no order for undisputed amount was issued.

The amount claimed as damages herein does not exceed \$15,000.00, and accordingly the shortened method of procedure set forth in the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Robert Swift & Co., Inc., is a corporation whose address 2175 Germantown Road South, Memphis, Tennessee.

2. Respondent, DeBruyn Produce Co., is a corporation whose address is P.O. Box 76, Zeeland, Michigan. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between the period of March through September, 1981, complainant, acting as a broker, negotiated the sale of various amounts of perishable produce from respondent to numerous buyers, and earned brokerage on such transactions in the total amount of \$2,805.50. All of such produce was shipped in interstate commerce.

4. On or about August 20, 1981, complainant purchased from respondent 258 cartons of green cabbage for a total invoice price of \$877.05. The amount due on this invoice was reduced by respondent in its answer to \$774.00. Complainant has not paid respondent this amount. This cabbage was shipped in interstate commerce.

5. On or about July 30, 1981, complainant purchased from respondent 250 cartons of green cabbage for a total invoice price of \$787.50. The amount due on this purchase was later reduced by respondent to \$708.75 due to a 25 carton shortage on arrival. This cabbage was shipped in interstate commerce.

6. The informal complaint was filed on November 23, 1981, which was within 9 months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant alleged in its formal complaint that there is due from respondent as brokerage on produce shipped during March through

September, 1981, a total amount of \$2,805.50. Respondent states that the correct amount due is \$2,756.75, and bases this allegation on a statement made by complainant during the informal stages of this proceeding. However, complainant has shown by the invoices attached to the complaint that the correct amount due as brokerage is \$2,805.50.

Respondent, in addition, alleges that two shipments of produce were sold by respondent to complainant, and that it is entitled to deduct the purchase price on these two shipments from the brokerage due to complainant. Complainant has admitted that it purchased from respondent the produce covered by finding 4. The remaining dispute between the parties is whether complainant purchased the produce covered by finding 5.

The parties to this proceeding have turned what is basically a very simple question of fact into an extremely complex question by continually throughout all stages of this proceeding referring to irrelevant transactions, confusing and misstating invoice and order numbers, and submitting and relying upon documentation which often times did not apply to the transaction at issue. In spite of these confusing circumstances we have isolated several factors which lead us to believe that the produce covered by finding 5 was purchased by complainant rather than having been brokered by complainant. First, as respondent points out, there was a history of complainant acting both as broker and as purchaser relative to commodities sold by respondent. Complainant admits that this was the case. Second, complainant used the same "Memo of Purchase" form relative to transactions in which it acted as purchaser and in transactions as to which it acted as broker. Third, respondent submitted a copy of the invoice covering the cabbage which is the subject of finding 5, and such invoice clearly shows a sale of the cabbage to complainant. Although complainant alleges that it promptly marked such invoice "not for Swift" and returned it, respondent denies ever receiving such invoice back from complainant in the mail. We believe it is incumbent upon a party who returns an invoice to make some type of record which would furnish evidence of such return. Complainant could have responded to the invoice with a telegram or with a certified letter. However complainant did not even return the invoice with a cover letter, and was not able to state on what date such invoice was returned to respondent. For these reasons we find that the cabbage which was the subject of finding 5 was purchased by complainant.

As stated previously complainant has admitted the purchase of the cabbage covered by finding 4 in the amount of \$774.00. This

ount added to the amount due on the cabbage covered by find-
 5 equals \$1,482.75. This figure should be subtracted from the to-
 brokerage of \$2,805.50 due to complainant, resulting in a net
 10 amount due to complainant of \$1,322.75. Respondent's failure to pay
 complainant such amount is a violation of section 2 of the Act for
 15 which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay
 complainant, as reparation, \$1,322.75, with interest thereon at
 e rate of 13% per annum from September 1, 1981, until paid.
 Copies of this order shall be served upon the parties.

(No. 22,581)

ASHBURN POTATO CO. v. REX E. SPARKS PRODUCE. PACA Docket
 2. 2-6089. Decided June 8, 1983.

O.B. sale—Rejection without reasonable cause—Breach of contract—Repa-
 tion awarded

complainant sold five truckloads of seed potatoes to respondent for shipment a few
 nths later. The contract was oral, negotiated by a broker who prepared and sent
 both parties memorandums of sale reflecting the agreed contract terms. Shortly
 hereafter, complainant prepared a written contract containing the contract terms
 1 sent it to respondent for his signature. A few weeks later respondent informed
 2 broker that he refused to sign the contract and did not want the potatoes. The
 3 broker forwarded the letter and the copy of the unsigned contract to complainant.
 4 spondent's repudiation of the contract constituted rejection without reasonable
 5 use. Respondent did not pick up the potatoes thus breaching the contract and
 6 nplainant resold them to various other customers. Reparation was awarded to
 7 nplainant.

drew Y. Stanton, presiding officer.
 complainant and respondent, *pro se*.

ecision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural
 Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A
 nely complaint was filed in which complainant seeks a reparation
 ard against respondent in the amount of \$1,680.00 in connection
 ith five truckloads of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Washburn Potato Co., is a corporation whose address is P.O. Box 158, Washburn, Maine.

2. Respondent, Rex E. Sparks Produce, is an individual, Rex E. Sparks, whose address is Route 1, Box 122A, Cedar Bluff, Virginia. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On October 21, 1981, complainant sold to respondent five truckloads of 1¾ inch to 3¼ inch Certified Blue Tag Kennebec seed potatoes consisting of approximately 2,250 cwt., at \$6.00 per cwt., or \$13,500.00 f.o.b. It was agreed that the potatoes would be shipped between February 1, 1982, and March 15, 1982, with at least 10 days prior notice. The contract was oral, negotiated by a broker, E. R. Albergotti, Inc., Roanoke, Virginia. That same day, the broker prepared memorandums of sale reflecting the agreed upon contract terms and sent them to both parties. Shortly thereafter, complainant prepared a written contract containing the contract terms, and sent it to respondent, for respondent's signature.

4. On December 4, 1981, respondent spoke over the telephone with W. T. Powell, Jr., an employee of the broker. Respondent told Powell that he was not going to sign any contract for the seed potatoes and did not want them.

5. In early January 1982, respondent sent the broker a letter, accompanied by the copy of the contract sent him by complainant, stating that respondent did not believe it to be in his best interest to sign the contract. The broker forwarded the note and contract to complainant.

6. On March 10, 1982, complainant wrote respondent a letter, stating that it was awaiting shipping instructions for the five truckloads of seed potatoes in accordance with their contract. The letter stated that if respondent did not pick up the potatoes on or

all the potatoes for respondent's account. Complainant would deny that it had purchased the potatoes. Respondent sent a reply, up.

7. From March 5, 1982, to March 24, 1982, complainant sold the 2,250 cwt. of Certified Kennebec seed potatoes on a delivered basis, as follows:

Buyer	Date of Sale	Quantity	Price Per Cwt.	Freight Per Cwt.
Merchants Grocery Co	3/5/82	250 cwt.	\$ 7.50	
The Grosset Co., Inc.	3/15/82	400 cwt.	8.50	\$3.10
Doug's Produce, Inc.	3/16/82	300 cwt.	8.50	3.50
Goots Produce Co.	3/18/82	400 cwt.	8.50	4.00
Coffey's Wholesale Produce	approx. 3/20/82	500 cwt.	8.50	3.25
Goots Produce Co.	3/24/82	400 cwt.	8.25	3.25

8. To date, respondent has failed to pay complainant the difference between the delivered prices less freight for the 2,250 cwt. of seed potatoes resold by complainant, or \$11,870.00, and the total contract price of \$13,500.00, or \$1,630.00.

9. A formal complaint was filed on April 29, 1982, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

Respondent denies liability for the five truckloads of seed potatoes, consisting of 2,250 cwt., which complainant alleges were sold to it for \$6.00 per cwt., f.o.b. Respondent claims that it did not enter into a firm contract to purchase these potatoes.

The record contains a letter from the broker to the Department, dated April 5, 1982, in which the broker states that it negotiated a contract between the parties on October 21, 1981, containing the contract terms alleged by complainant. The broker states that it immediately issued a memorandum of sale reflecting these contract terms and sent it to both parties. Respondent does not deny dealing with the broker on October 21, 1981, or receiving the memorandum of sale. Respondent asserts that, on November 1, 1981, he received a copy of the contract from complainant for his signature, but did not sign it. Respondent claims that on December 4, 1981, he spoke to the broker over the telephone and indicated his refusal to sign. He states that he mailed the unsigned contract to the broker on January 4, 1982.

It is apparent from the evidence that respondent entered into a contract of purchase and sale with complainant on October 21, 1981, covering the five truckloads of potatoes at issue. The broker's statement to this effect is corroborated by its memorandum of sale, mailed to and apparently received by respondent, who made no objection until December 4, 1981. The written contract which respondent claims to have received from complainant on November 1, 1981, was superfluous, as a binding contract had already been formed on October 21, 1981. Thus, respondent's failure to sign the written contract had no legal effect with respect to the existence of its contractual obligation to purchase the potatoes from complainant.

Respondent's December 4, 1981, conversation with the broker was a clear indication of respondent's repudiation of the contract and constituted rejection without reasonable cause. 7 CFR 46.2(bb)(3); *Turtle Valley Farms v. Riehm Produce Co.*, 20 A.D. 43 (1961). Since respondent repudiated the contract before performance was due, complainant had the option of either waiting a commercially reasonable time for respondent to pick up the potatoes or immediately resorting to any remedy for breach of contract. Uniform Commercial Code, section 2-610. Complainant thus acted lawfully in choosing to wait until March before reselling the potatoes.¹

The Uniform Commercial Code, section 2-703, provides, in relevant part, that when the buyer wrongfully rejects, the aggrieved seller may resell and recover damages. Section 2-706 provides that when such resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and contract price, plus any incidental damages, less expenses saved in consequence of the buyer's breach. *Beaver Brook Farms, Inc. v. Lord Brothers, Inc.*, 40 A.D. 625 (1981). Complainant resold the 2,250 cwt. of potatoes constituting the five truckloads in March 1982 (Finding of Fact 7). Since the resales were made on a delivered basis, the f.o.b. prices can be determined by subtracting the expenses for freight from the proceeds. We thus find the f.o.b. prices resulting from the resales totaling \$11,870.00. The contract price for the 2,250 cwt. at \$6.00 per cwt., f.o.b., totals \$13,500.00. The difference between the contract price and resale price comes to \$1,650.00, which constitutes complainant's damages resulting from

¹ Although complainant's March 10, 1982, letter to respondent (Finding of Fact 6) states that complainant will wait until March 15, 1982, to begin resales, and the initial resale was made on March 5, 1982, such resale was in conformance with complainant's right to immediately resort to any remedy for breach of contract.

respondent's breach of contract. Respondent's failure to pay the sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,650.00, with interest thereon at the rate of 13% per annum from April 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,582)

BLUE ANCHOR, INC. v. JOSEPH KAHAN. PACA Docket No. 2-6095.
Decided June 8, 1983.

F.O.B. sale—Acceptance—Merchantable condition—Reparation awarded

Respondent purchased from complainant two lots of grapes on an F.O.B. basis after inspecting or having an opportunity to inspect such grapes. A few days later respondent returned 77 lugs of the grapes to complainant claiming they were in poor condition. Complainant accepted the returned grapes from respondent and gave respondent full credit for the returned grapes. Complainant brings this action to recover the purchase price of the 115 lugs of grapes not returned by respondent. Respondent failed to submit any inspection certificate disclosing the condition of the grapes nor did he submit a dump certificate. Thus respondent failed to prove that the grapes were not in merchantable condition when he accepted them. Reparation was awarded to complainant.

George S. Whitten, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$1,840.00 in connection with the sale of two lots of grapes in foreign commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount involved herein does not exceed \$15,000.00, and the shortened method of procedure provided in the Rules of Practice (7 CFR 47.20) is therefore applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Blue Anchor, Inc., is a corporation whose address is P.O. Box 15498, Sacramento, California.

2. Respondent, Joseph Kahan, is an individual whose address is 232 Hewes Street, Brooklyn, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about February 3, 1982, respondent visited complainant's cold storage room located in the New York Fruit Auction, Hunts Point Terminal Market, Bronx, New York, and purchased 96 lugs of Perlette grapes after inspecting or having opportunity to inspect such grapes. Respondent signed a ticket evidencing receipt of such grapes and proceeded to distribute the grapes to its customers on February 3, 1982. The terms of the contract between complainant and respondent were \$16.00 per lug f.o.b. cold storage room. On the following day, February 4, 1982, respondent again visited the cold storage room of complainant and purchased a second lot consisting again of 96 lugs of Perlette grapes under the same circumstances and on the same terms as the previous day.

4. On February 8, 1982, respondent returned 77 lugs of the grapes to complainant, with the complaint that they were in poor condition. Complainant accepted the 77 lugs back from respondent and gave respondent full credit for the price of such lugs.

5. The formal complaint was filed on June 14, 1982, which was within 9 months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the \$16.00 per lug purchase price of the 115 lugs of Perlette grapes which respondent purchased from complainant and did not return. Respondent contends that the 115 lugs of grapes were in very poor condition and were dumped by respondent's customers. Respondent submitted the statements from several of its customers affirming the poor condi-

tion of the grapes and stating that they were all thrown away. However, respondent did not submit any inspection certificate disclosing the condition of the grapes nor did respondent submit a dump certificate. We have often refused to accord any significant weight to testimonial evidence relative to the condition of perishable commodities due to the imprecise nature of such evidence. See *Mutual Vegetable Sales v. Select Distributors*, 38 A.D. 1359 (1979) and cases there cited. Respondent had the burden of proving that the grapes were not in merchantable condition when accepted by respondent and respondent has failed to meet this burden of proof.

Since respondent accepted the grapes and failed to prove any breach on the part of complainant it became liable to complainant for the full purchase price thereof, or \$1,840.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,840.00 with interest thereon at the rate of 13 percent per annum from March 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,583)

WADE HATCHER and D.C. HOLLAND v. C. H. ROBINSON COMPANY.
PACA Docket No. 2-6061. Decided June 21, 1983.

F.O.B. Sale—Broker responsibilities—Complaint dismissed

Respondent, acting as a broker, arranged a sale of 1,280 cartons of tomatoes F.O.B. by complainant to a produce firm in Kansas City, Missouri. The customer in Kansas City rejected the truckload upon its arrival due to poor condition. However, complainant and the customer then agreed, with respondent confirming in writing, that the customer would take the tomatoes with protection against loss and labor, with inspection to be made as soon as possible. After inspection the customer in Kansas City sold the tomatoes and reached oral agreements with complainant for price adjustments and respondent immediately issued a brokers confirmation of adjustment which was sent to both parties. Complainant failed to prove that respondent was the purchaser of the tomatoes involved. Rather the record is replete with evidence that respondent merely acted as a broker. The complaint was dismissed.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Owen Gleason, Eden Prairie, Minnesota, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$6,272.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file any documents. Respondent filed an answering statement and a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Wade Hatcher and D. C. Holland, doing business as Wade Hatcher and D. C. Holland, whose address is P.O. Box 1288, Homestead, Florida 33030.

2. Respondent is a corporation with an address of 7525 Mitchell Road, Eden Prairie, Minnesota 55343. At the time of the transaction involved in this proceeding, respondent was licensed under the Act.

3. On June 15, 1981, the respondent, acting as a broker, arranged, in conjunction with Stan Scherer Marketing Service, Inc. of Miami, Florida, which was the sales agent for complainant in Johns Island, South Carolina, for the sale of 1,280 cartons of tomatoes, f.o.b., by complainant to Tom's Produce Company, 313 Walnut Street, Kansas City, Missouri. On or about June 15, 1981, there were loaded on a truck 64 cartons of number 30 5 × 6 tomatoes at an invoice price of \$7.00 per carton, 768 cartons of number 30 6 × 6 tomatoes at an invoice price of \$5.00 per carton, and 448 cartons of number 30 6 × 7 tomatoes at an invoice price of \$4.00 per carton, plus \$.15 per carton for palletizing, for a total contract price of

\$6,272.00. The truckload of tomatoes was shipped on June 15, 1981 from Johns Island, South Carolina to Kansas City, Missouri.

4. On June 19, 1981, respondent issued a Broker's Standard Memorandum of Sale, which was provided to both the complainant and Tom's Produce, which memorandum reflected the contract terms described in finding of fact 3, above.

5. On or about June 20, 1981, the truckload of tomatoes arrived in Kansas City, Missouri.

6. Tom's Produce rejected the tomatoes as a result of their condition and general decay. Complainant and Tom's Produce then orally agreed, with respondent making a confirmation in writing, that Tom's Produce would take the tomatoes with protection against loss and labor, with an inspection to be taken as soon as possible. The tomatoes were then unloaded, and stored in Tom's Produce's store.

6. On June 22, 1981, the tomatoes were subjected to a federal inspection. The inspection showed in pertinent part as follows:

Products Inspected: TOMATOES in cartons printed "Hatcher and Holland, Johns Island, S.C. Net Wt. 30 Lbs."

Applicant states approximately 1,200 cartons.

Condition of Load: Stacked on pallets in applicant's store.

Condition of Pack: Well filled.

Condition: Average approximately 10% turning and pink, 80% light red and red. Decay ranges from 2 to 20% average 9% Sour Rot and Gray Mold Rot each mostly in advanced, many in early stages. Damaged by bruising average 2%.

8. Tom's Produce sold the tomatoes and reached an oral agreement with complainant for a price adjustment as follows: 64 number 30, 5×6's to \$3.80; 768 number 30, 6×6's to \$2.30; and 448 number 30, 6×7's to \$1.30, such prices f.o.b. and to include palletizing. The next day a subsequent oral agreement was reached in which the contract prices were modified so that the 5×6 tomatoes were sold at \$3.90 f.o.b. plus \$.15 palletizing, the 6×6 tomatoes were sold for \$2.40 f.o.b. plus \$.15 palletizing, and the 6×7 tomatoes were sold for \$1.40 f.o.b., plus \$.15 palletizing. Respondent immediately issued a Brokers Confirmation of Adjustment, which was sent to both parties.

9. Tom's Produce eventually paid complainant \$2,560.00 for the tomatoes it purchased and sold.

10. An informal complaint was filed on September 21, 1981, which was within nine months after the date the cause of action arose.

CONCLUSIONS

Complainant alleged in its complaint that it sold a truckload of 1,280 cartons of tomatoes, f.o.b., to respondent on June 15, 1981 with shipment on that date from Johns Island, South Carolina to Kansas City, Kansas. It claimed that the commodity was inspected prior to shipment, and that at that time the tomatoes were in suitable shipping condition. Therefore, complainant believes that respondent is obligated to pay it the difference between \$6,272.00 and the \$2,560.00 which it eventually received, a differential of \$3,712.00. Respondent contends that it did not purchase the truckload of tomatoes from complainant, but rather that it acted as a broker in a transaction between complainant and Tom's Produce, a corporation located in Kansas City, Missouri, which eventually received the tomatoes. Respondent further avers in its defense that when the tomatoes arrived in Missouri, they were immediately inspected by Tom's Produce, and that respondent negotiated both a modification and a subsequent modification, to the contract to change the price of the various types of tomatoes involved between complainant and Tom's Produce. Therefore, according to respondent, complainant has sued the wrong party because respondent was neither the purchaser, nor did it in any way violate its brokerage responsibilities.

As the proponent of a claim of breach of contract in this proceeding the complainant has the burden of proof (*New York v. Sandler*, 32 Agric. Dec. 702 (1973)). Complainant has failed to show that respondent was the purchaser of the produce involved. Rather, the record is replete with evidence that respondent merely acted as a broker, and that Tom's Produce was the actual purchaser of the truckload of tomatoes. Since there was no allegation that respondent acted improperly as a broker we need not reach the issue as to whether it carried out its duties as it should. In any event, however, based on this record, there is no proof that respondent did other than carry out its duties in a proper business manner. Respondent issued a Broker's Memorandum of Sale with respect to the transaction shortly after the transaction was entered. Furthermore when Tom's Produce notified it that the tomatoes were of poor quality the respondent twice entered into renegotiations of the contract, and submitted to the parties Broker's Confirmations of Adjustment in both instances, to which no objection was taken by complainant. The only evidence in the record as to any involvement with respect to the purchase and sale of tomatoes by respondent is a check from respondent to complainant for \$2,516.00. This matter was not discussed in the pleadings by the parties. However, it is consistent

with the activities of a broker to collect on behalf of a seller, and remit to it the proceeds received from the buyer.

Because complainant has failed to show that respondent acted other than as a broker in this transaction, it is not necessary that we reach the question as to whether there was a breach of contract on the part of Tom's Produce when it refused to accept the delivery of the tomatoes. Neither do we need to determine whether the tomatoes were shipped in suitable shipping condition. The simple fact is that complainant sued the wrong party if it wished to have these issues disposed of. In order for this tribunal to consider these matters complainant necessarily would have to sue Tom's Produce.

In view of the above the complaint must be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,584)

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING v. SA-SO POULTRY SALES Co., INC. a/t/a VALENTINE FOOD. PACA Docket No. 2-6276. Decided June 23, 1983.

Payment of undisputed amount

Andrew Y. Stanton, Presiding Officer.

Frank V. Charles, Chelsea, Massachusetts, for complainant.

Robert G. Bauer, Philadelphia, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed on November 12, 1982. Complainant seeks to recover \$45,731.80 which amount is alleged to be the total purchase price for cantaloupes sold to and accepted by respondent. Respondent filed an answer to the formal complaint on March 1, 1983, admitting that \$25,216.00 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$25,216.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from August 1, 1982, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

(No. 22,585)

PHELAN & TAYLOR PRODUCE COMPANY, INC. *v.* SA-SO POULTRY SALES CO., INC. a/t/a VALENTINE FOODS. PACA Docket No. 2-6286. Decided June 23, 1983.

Payment of undisputed amount

Andrew Y. Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Robert G. Bauer, Philadelphia, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on November 29, 1982, and a formal complaint was filed on March 15, 1983. Complainant seeks to recover \$5,919.60, which amount is alleged to be the total purchase price for mixed vegetables sold to and accepted by respondent. Respondent filed an answer to the formal complaint on May 3, 1983, admitting that \$721.00 of the amount claimed by complainant was

due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$721.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 18 percent per annum from October 1, 1982, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MISCELLANEOUS ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,586)

PRODUCE ASSOCIATES, INC. *v.* SHOP-RITE FOODARAMA OF
LAURELTON, INC. PACA Docket No. 2-6138. Order issued May 5,
1983.

ORDER ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). An order of dismissal was issued on February 15, 1983, because the parties had previously agreed to a dismissal, with prejudice, of the same cause of action in a New Jersey State court. By letter dated April 8, 1983, and received April 11, 1983, complainant has moved for reconsideration of our Order of Dismissal.

The Rules of Practice governing these proceedings permit petitions for reconsideration to be filed within 10 days after service of

an order. The February 15, 1983, order was served on complainant on February 19, 1983. Therefore, the petition for reconsideration was filed 41 days late.

In any event, the order became final and unappealable in any forum on March 17, 1983, which was 30 days after issuance. *American Fruit Grow. v. Lewis D. Goldstein F&P Corp.*, 78 F.Supp. 309 (E.D. Pa. 1948); *Southland Produce Co. v. Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

In view of the above, the petition for reconsideration is denied.

(No. 22,587)

FRESH WESTERN MARKETING *v.* MORENO PRODUCE COMPANY.
PACA Docket No. 2-6232. Order issued May 5, 1983.

ORDER (Continuance)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$1,467.50 against respondent in connection with transactions in interstate commerce involving shipments of lettuce. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Fresh Western Marketing, is a corporation whose address is P.O. Box 5275, Salinas, California. Respondent, Moreno Produce Company, is a corporation whose address is P.O. Box 296, LaFeria, Texas 78559. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the filing of a decision and order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Southern District of Texas, a voluntary petition for reorganization pursuant to a Chapter XI of the Bankruptcy Act (11 U.S.C. §§1101-1174). The Department has received a copy of this petition.

11 U.S.C. §362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. §362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the

debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

(No. 22,588)

PURE GOLD, INC. *v.* MORENO PRODUCE COMPANY. PACA Docket No. 2-6151. Order issued May 12, 1983.

ORDER (Continuance)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$4,868.75 against respondent in connection with transactions in interstate commerce involving shipments of lemons. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Pure Gold, Inc., is a corporation whose address is P.O. Box 40, Redlands, California 92373. Respondent, Moreno Produce Company, is a partnership whose address is P.O. Box 296, LaFeria, Texas 78559. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of the final order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Southern District of Texas, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. §362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. §362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

(No. 22,589)

PEARSON AND LANE PACKING COMPANY v. MORENO PRODUCE COMPANY. PACA Docket No. 2-6189. Order issued May 12, 1983.

ORDER (Continuance)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$7,124.00 against respondent in connection with transactions in interstate commerce involving shipments of peaches. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Pearson and Lane Packing Company, is a partnership whose address is P.O. Box 716, Fort Valley, Georgia 31030. Respondent Moreno Produce Company, is a partnership whose address is P.O. Box 296, LaFeria, Texas 78559. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of the final order in the proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Southern District of Texas, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. §362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. §362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

(No. 22,590)

CARL DOBLER & SONS *v.* GILARDI TRUCK & TRANSPORTATION, INC.
a/t/a A. M. GILARDI & SONS. PACA Docket No. 2-6202. Order issued May 12, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$1,407 in connection with a transaction involving the shipment of lettuce in interstate commerce.

In its answer, respondent admitted owing \$575 of the amount claimed by complainant. An Order requiring payment of undisputed amount was issued on March 3, 1983, awarding \$575 to complainant against respondent. By letter dated April 11, 1983, complainant notified the Department that it wished to withdraw its complaint. Therefore, complainant's complaint for the \$832 remaining in dispute is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,591)

GOLDEN WEST PACKING CO. *v.* S & K FARMS INC. PACA Docket No. 2-6158. Order issued May 13, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$10,181.00 in connection with a transaction involving the shipment of celery in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 14, 1983, complainant notified the Department that respondent tendered to complainant a sum in full settlement of complainant's claim and authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,592)

RUSHTON & Co., INC. *v.* EVERGOOD ENTERPRISES. PACA Docket No. 2-5847. Order issued June 8, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an Order was issued on April 21, 1983, awarding reparation to the complainant in the amount of \$24,382.22, with interest thereon at the rate of 13% per annum from May 1, 1980, until paid. By telegram, received May 17, 1983, but dated May 12, 1983, respondent has requested a stay of that Order to give it time to file a Motion for Reconsideration.

Accordingly, the Order of April 21, 1983, is stayed. Respondent must file its Motion for Reconsideration within 15 days from its receipt of this Order.

Copies of this Order shall be served on the parties. Copies shall also be sent to counsel for both parties.

(No. 22,593)

LA CASITA FARMS *v.* ROBERT RUIZ, INC. PACA Docket No. 2-6018. Order issued June 8, 1983.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C., 499a *et seq.*), the parties have reached a settlement of their dispute and complainant has authorized dismissal of the complaint. Accordingly, the complaint is dismissed.

(No. 22,594)

CARL DOBLER & SONS *v.* PALERMO & CASCIO, INC. PACA Docket No. 2-6020. Order issued June 21, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on May 4, 1983, dismissing the complaint.

By telegram dated May 11, 1983, and received on May 17, 1983, complainant moved that this matter be stayed to give it time to file a Petition for Reconsideration. The Petition was filed on May 26, 1983.

Accordingly, the order of May 4, 1983, is hereby stayed. Respondent may have fifteen (15) days from receipt of this order to file its response to complainant's Petition for Reconsideration.

Copies of this order shall be served upon the parties. A copy of complainant's Petition for Reconsideration shall be served on respondent.

(No. 22,595)

TOM BENGARD RANCH, INC. a/t/a KLEEN HARVEST v. GARDEN STATE FARMS, INC. PACA Docket No. 2-5994. Order issued June 23, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) a Decision and Order was issued on May 4, 1983, awarding reparation to the complainant in the amount of \$207.50. By mailgram received May 18, 1983, complainant has moved that this matter be reconsidered. A petition for reconsideration was filed on June 2, 1983.

Accordingly, the order of May 14, 1983 is hereby stayed. The petition for reconsideration shall be served upon respondent, which will have 15 days from its receipt thereof to file an answer to the petition.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY

DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,596)

TOMATOES INC. *v.* LEVY SPECIALTIES INC. PACA Docket No. RD-83-218. Decided May 6, 1983.

Respondent was ordered to pay complainant as reparation \$1,584.00 plus 13 percent interest from March 1, 1982, until paid.

(No. 22,597)

VENTURA COASTAL CORPORATION a/t/a COASTAL FRESH FRUIT SALES *v.* SUN-GLO WHOLSEALE FRUIT & PRODUCE. PACA Docket No. RD-83-219. Decided May 6, 1983.

Respondent was ordered to pay complainant as reparation \$4,350.00 plus 13 percent interest from July 1, 1982, until paid.

(No. 22,598)

UNITED DISTRIBUTORS INC. *v.* SUN-GLO WHOLESALE FRUIT & PRODUCE. PACA Docket No. RD-83-220. Decided May 6, 1983.

Respondent was ordered to pay complainant as reparation \$2,229.50 plus 13 percent interest from July 1, 1982, until paid.

(No. 22,599)

GREAT AMERICAN SALES, INC. *v.* JERRY F. TUCKER d/b/a TUCKER PRODUCE CO. AND/OR TUCKER PRODUCE CO., INC. PACA Docket No. RD-83-222. Decided May 6, 1983.

Respondent was ordered to pay complainant as reparation \$2,800.50 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,600)

A. DUDA & SONS, INC. *v.* JERRY F. TUCKER d/b/a TUCKER PRODUCE CO. AND/OR TUCKER PRODUCE CO., INC. PACA Docket No. RD-83-223. Decided May 6, 1983.

Respondent was ordered to pay complainant as reparation \$7,850.80 plus 13 percent interest from July 1, 1982, until paid.

(No. 22,601)

FRUDDEN PRODUCE INC. *v.* J G S PRODUCE CORP. PACA Docket No. RD-83-224. Decided May 9, 1983.

Respondent was ordered to pay complainant as reparation \$8,530.00 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,602)

STRUBE CELERY & VEGETABLE Co. *v.* CHICAGO METRO FOOD COMPANY a/t/a ALEX GORDON FOOD COMPANY. PACA Docket No. RD-83-225. Decided May 9, 1983.

Respondent was ordered to pay complainant as reparation \$6,449.38 plus 13 percent interest from December 1, 1982, until paid.

(No. 22,603)

EMIL KAHN INC. a/t/a WOLFF FOODS *v.* CHICAGO METRO FOOD COMPANY a/t/a ALEX GORDON FOOD COMPANY. PACA Docket No. RD-83-226. Decided May 9, 1983.

Respondent was ordered to pay complainant as reparation \$7,442.17 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,604)

DIETZ & KOLODENKO *v.* CHICAGO METRO FOOD COMPANY a/t/a ALEX GORDON FOOD COMPANY. PACA Docket No. RD-83-227. Decided May 9, 1983.

Respondent was ordered to pay complainant as reparation \$6,320.74 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,605)

VALLEY CENTRAL SALES INC. *v.* KING TOMATO CORPORATION a/t/a L&S PRODUCE. PACA Docket No. RD-83-228. Decided May 9, 1983.

Respondent was ordered to pay complainant as reparation \$9,650.00 plus 13 percent interest from June 1, 1982, until paid.

(No. 22,606)

DELAWARE PRODUCE GROWERS, INC. *v.* KING TOMATO CORPORATION a/t/a L&S PRODUCE. PACA Docket No. RD-83-229. Decided May 10, 1983.

\$20,888.50 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,607)

TONY VITRANO CO. *v.* GEORGETOWN PRODUCE INC. PACA Docket No. RD-83-230. Decided May 10, 1983.

Respondent was ordered to pay complainant as reparation \$13,280.40 plus 13 percent interest from February 1, 1983, until paid.

(No. 22,608)

SID GOODMAN & CO., INC. *v.* GEORGETOWN PRODUCE INC. PACA Docket No. RD-83-231. Decided May 10, 1983.

Respondent was ordered to pay complainant as reparation \$16,877.95 plus 13 percent interest from December 1, 1982, until paid.

(No. 22,609)

SMITH POTATO INC. *v.* MIDWEST PRODUCE COMPANY INC. PACA Docket No. RD-83-233. Decided May 10, 1983.

Respondent was ordered to pay complainant as reparation \$14,961.50 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,610)

F. C. SANDERS d/b/a SANDERS TOMATO COMPANY *v.* DE FEO PACKERS & DISTRIBUTORS INC. PACA Docket No. RD-83-236. Decided May 10, 1983.

Respondent was ordered to pay complainant as reparation \$6,772.50 plus 13 percent interest from August 1, 1982, until paid.

(No. 22,611)

HERSHELL GUTHRIE *v.* RICHARD LAND. PACA Docket No. RD-83-190. Decided May 13, 1983.

Respondent was ordered to pay complainant as reparation \$1,313.90 plus 13 percent interest from August 1, 1982, until paid.

(No. 22,612)

LOUIE PRODUCE COMPANY *v.* EVERGREEN SUPPLY CO. PACA
Docket No. RD-83-221. Decided May 24, 1983.

Respondent was ordered to pay complainant as reparation
\$28,642.95 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,613)

DAVE KINGSTON PRODUCE INC. *v.* ARNOLD J. RODIN INC. PACA
Docket No. RD-83-237. Decided June 1, 1983.

Respondent was ordered to pay complainant as reparation \$6,927.25
plus 13 percent interest from February 1, 1983, until paid.

(No. 22,614)

NORTHWEST COLD PACK COMPANY *v.* HAMILTON FOODS, INC. PACA
Docket No. RD-83-239. Decided June 1, 1983.

Respondent was ordered to pay complainant as reparation \$2,695.25
plus 13 percent interest from June 1, 1982, until paid.

(No. 22,615)

TOMATOES INC. *v.* V. A. SONS INC. PACA Docket No. RD-83-240,
Decided June 1, 1983.

Respondent was ordered to pay complainant as reparation \$3,925.00
plus 13 percent interest from July 1, 1982, until paid.

(No. 22,616)

LEE & LEE a/t/a YOLO MARKET CO. *v.* STEVE PAPPAS AND JOHN
STAMOS d/b/a J&S POTATO Co. PACA Docket No. RD-83-241, De-
cided June 1, 1983.

Respondent was ordered to pay complainant as reparation \$3,748.00
plus 13 percent interest from August 1, 1982, until paid.

(No. 22,617)

PURE GOLD, INC. *v.* RODOLFO RUBIO d/b/a GATEWAY PRODUCE CO.
PACA Docket No. RD-83-242. Decided June 2, 1983.

Respondent was ordered to pay complainant as reparation \$3,910.37
plus 13 percent interest from September 1, 1982, until paid.

(No. 22,618)

PACIFIC FARM COMPANY *v.* KING TOMATO CORPORATION a/t/a L S PRODUCE. PACA Docket No. RD-83-244. Decided June 2, 1983.

Respondent was ordered to pay complainant as reparation \$7,380.90 plus 13 percent interest from August 1, 1982, until paid.

(No. 22,619)

BUD ANTLE, INC. *v.* SUN-GLO WHOLESALE FRUIT & PRODUCE. PACA Docket No. RD-83-245. Decided June 2, 1983.

Respondent was ordered to pay complainant as reparation \$21,698.35 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,620)

SHERRON FARMS INC. *v.* NETWORK BROKERAGE INC. PACA Docket No. RD-83-246. Decided June 2, 1983.

Respondent was ordered to pay complainant as reparation \$8,750.00 plus 13 percent interest from August 1, 1982, until paid.

(No. 22,621)

HOWARTH AND CO., INC. a/t/a GONZALES PACKING CO. *v.* JERRY F. TUCKER d/b/a TUCKER PRODUCE CO. AND/OR TUCKER PRODUCE CO., INC. PACA Docket No. RD-83-247. Decided June 3, 1983.

Respondent was ordered to pay complainant as reparation \$3,642.50 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,622)

SMITH POTATO INC. *v.* C&J PRODUCE CO. INC. PACA Docket No. RD-83-248. Decided June 3, 1983.

Respondent was ordered to pay complainant as reparation \$8,283.00 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,623)

A. DUDA & SONS, INC. *v.* CENTRAL VIRGINIA PRODUCE CO. PACA Docket No. RD-83-250. Decided June 3, 1983.

Respondent was ordered to pay complainant as reparation \$6,000.60 plus 13 percent interest from July 1, 1982, until paid.

(No. 22,624)

PARIS FOODS CORPORATION *v.* RUSSEL F. CROWE ESTATE. PACA Docket No. RD-83-251. Decided June 3, 1983.

Respondent was ordered to pay complainant as reparation \$4,740.16 plus 13 percent interest from May 1, 1982, until paid.

(No. 22,625)

GOLMAN-HAYDEN CO. INC. *v.* WEAVER PRODUCE. PACA Docket No. RD-83-252. Decided June 6, 1983.

Respondent was ordered to pay complainant as reparation \$1,171.25 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,626)

SAWYER FRUIT & VEGETABLE COOPERATIVE CORPORATION *v.* M&R EGG Co. PACA Docket No. RD-83-253. Decided June 6, 1983.

Respondent was ordered to pay complainant as reparation \$7,511.20 plus 13 percent interest from June 1, 1982, until paid.

(No. 22,627)

GROWERS MARKETING SERVICE INC. *v.* DARRY W. NICHOLS d/b/a DARRY NICHOLS CO. PACA Docket No. RD-83-254. Decided June 6, 1983.

Respondent was ordered to pay complainant as reparation \$13,124.20, plus 13 percent interest from August 1, 1982, until paid.

(No. 22,628)

GENBROKER CORPORATON a/t/a GENERAL BROKERAGE Co. *v.* PACIFIC FOOD PROCESSORS & EXPORTERS INC. PACA Docket No. RD-83-255. Decided June 6, 1983.

Respondent was ordered to pay complainant as reparation \$8,180.71 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,629)

SUN VALLEY DISTRIBUTORS INC. *v.* YGNACIO D. LOPEZ d/b/a CAT LOPEZ, JR. PACA Docket No. RD-83-234. Decided June 10, 1983.

Respondent was ordered to pay complainant as reparation \$9,606.37 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,630)

GOLD COAST PACKING INC. *v.* S. CORTELLO INC. PACA Docket No. RD-83-257. Decided June 10, 1983.

Respondent was ordered to pay complainant as reparation \$27,896.60 plus 13 percent interest from August 1, 1982, until paid.

(No. 22,631)

MCDANIEL FRUIT CO. *v.* J. R. CORTES & Co. PACA Docket No. RD-83-258. Decided June 10, 1983.

Respondent was ordered to pay complainant as reparation \$6,382.65 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,632)

PAUL J. MACRIE INC. *v.* COAST TO COAST PRODUCE INC. PACA Docket No. RD-83-259. Decided June 10, 1983.

Respondent was ordered to pay complainant as reparation \$16,744.70 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,633)

CALIFORNIA ARTICHOKE AND VEGETABLE GROWERS CORPORATION *v.* D. L. FOOD PURVEYORS INC. a/t/a MDM FOODS. PACA Docket No. RD-83-260. Decided June 13, 1983.

Respondent was ordered to pay complainant as reparation \$4,451.50 plus 13 percent interest from June 1, 1982, until paid.

(No. 22,634)

RALPH T. MAY d/b/a RALPH MAY FARMS *v.* ARISTA PRODUCE CORP. PACA Docket No. RD-83-261. Decided June 13, 1983.

Respondent was ordered to pay complainant as reparation \$5,616.00 plus 13 percent interest from May 1, 1982, until paid.

(No. 22,635)

HORWATH AND Co. INC. a/t/a GONZALES PACKING Co. *v.* J. R. CORTES & Co. PACA Docket No. RD-83-262. Decided June 13, 1983.

Respondent was ordered to pay complainant as reparation \$3,601.35 plus 13 percent interest from November 1, 1982, until paid.

(No. 22,636)

FRUDDEN PRODUCE INC. v. J. R. CORTES & Co. PACA Docket No. RD-83-263. Decided June 13, 1983.

Respondent was ordered to pay complainant as reparation \$6,814.35 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,637)

BOTSFORD & GOODFELLOW INC. v. GLADYS ROYSE d/b/a MANDAN PRODUCE. PACA Docket No. RD-83-264. Decided June 14, 1983.

Respondent was ordered to pay complainant as reparation \$2,372.60 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,638)

O&E GROWERS INC. v. RONALD GAMBINO d/b/a G.R.S. WHOLESALE NURSERY & PRODUCE. PACA Docket No. RD-83-265. Decided June 14, 1983.

Respondent was ordered to pay complainant as reparation \$2,400.00 plus 13 percent interest from February 1, 1983, until paid.

(No. 22,639)

MURAKAMI FARMS, INC. a/t/a MURAKAMI PRODUCE Co. v. ARNOLD J. RODIN INC. PACA Docket No. RD-83-266. Decided June 14, 1983.

Respondent was ordered to pay complainant as reparation \$3,155.00 plus 13 percent interest from November 1, 1982, until paid.

(No. 22,640)

LEVY & Co. INC. v. ARNOLD J. RODIN INC. PACA Docket No. RD-83-267. Decided June 14, 1983.

Respondent was ordered to pay complainant as reparation \$1,594.00 plus 13 percent interest from January 1, 1983, until paid.

(No. 22,641)

PAUL'S PAK INC. v. ARNOLD J. RODIN INC. PACA Docket No. RD-83-268. Decided June 15, 1983.

Respondent was ordered to pay complainant as reparation \$1,040.75 plus 13 percent interest from December 1, 1982, until paid.

(No. 22,642)

PITMAN & SONS, INC. *v.* MYERS BROS. PRODUCE. PACA Docket No. RD-83-269. Decided June 15, 1983.

Respondent was ordered to pay complainant as reparation \$6,414.74 plus 13 percent interest from November 1, 1982, until paid.

(No. 22,643)

ROBERT L. MEYER d/b/a MEYER TOMATOES *v.* J.G.S. PRODUCE CORP. PACA Docket No. RD-83-270. Decided June 15, 1983.

Respondent was ordered to pay complainant as reparation \$3,667.50 plus 13 percent interest from September 1, 1982, until paid.

(No. 22,644)

BUSHMANS' INC. *v.* C & J PRODUCE CO., INC. PACA Docket No. RD-83-271. Decided June 15, 1983.

Respondent was ordered to pay complainant as reparation \$4,175.00 plus 13 percent interest from December 1, 1982, until paid.

(No. 22,645)

TRANSNATIONAL SERVICES CORPORATION *v.* LEVY SPECIALTIES INC. PACA Docket No. RD-83-273. Decided June 16, 1983.

Respondent was ordered to pay complainant as reparation \$2,612.10 plus 13 percent interest from May 1, 1982, until paid.

(No. 22,646)

PEREZ RANCHES INC. a/t/a P.R.I. SALES CO. *v.* ERNEST M. VALENCIA d/b/a VALENCIA BROS. PRODUCE CO. PACA Docket No. RD-83-274. Decided June 16, 1983.

Respondent was ordered to pay complainant as reparation \$14,851.70 plus 13 percent interest from March 1, 1982, until paid.

(No. 22,647)

IDAHO FRUIT SALES, INC. *v.* C & J PRODUCE COMPANY INC. PACA Docket No. RD-83-275. Decided June 16, 1983.

Respondent was ordered to pay complainant as reparation \$6,680.25 plus 13 percent interest from January 1, 1983, until paid.

(No. 22,648)

JOE VIRGA PRODUCE Co., INC. v. TREASURE VALLEY PRODUCE. PACA Docket No. RD-83-276. Decided June 16, 1983.

Respondent was ordered to pay complainant as reparation \$2,978.30 plus 13 percent interest from January 1, 1983, until paid.

(No. 22,649)

R. F. TAPLETT FRUIT & COLD STORAGE Co. v. MAGGIE-PAUL, INC. PACA Docket No. 2-6278. Decided June 17, 1983.

Respondent was ordered to pay complainant as reparation \$168,175.00 plus 13 percent interest from December 1, 1982.

(No. 22,650)

VIRGINIA FRUIT SALES SERVICE INC. v. MAGGIE-PAUL, INC. PACA Docket No. 2-6279. Decided June 17, 1983.

Respondent was ordered to pay complainant as reparation \$28,281.50 plus 13 percent interest from January 1, 1983, until paid.

(No. 22,651)

BLUE ANCHOR, INC. v. MAGGIE-PAUL, INC. PACA Docket No. 2-6280. Decided June 17, 1983.

Respondent was ordered to pay complainant as reparation \$10,474.50 plus 13 percent interest from December 1, 1982, until paid.

(No. 22,652)

SAHARA PACKING COMPANY v. CENTRAL FOODS, INC. PACA Docket No. RD-83-232. Decided June 20, 1983.

Respondent was ordered to pay complainant as reparation \$546.00 plus 13 percent interest from January 1, 1982.

(No. 22,653)

MCDUGALL & SONS INC. v. WE SHENG FOOD INDUSTRY (USA) Co. INC. PACA Docket No. RD-83-277. Decided June 24, 1983.

Respondent was ordered to pay complainant as reparation \$8,716.10 plus 13 percent interest from January 1, 1983.

(No. 22,654)

STIRLING-UNDERWOOD, INC. *v.* WE SHENG FOOD INDUSTRY (USA) Co. INC. PACA Docket No. RD-83-278. Decided June 24, 1983.

Respondent was ordered to pay complainant as reparation \$64,051.00 plus 13 percent interest from January 1, 1983.

(No. 22,655)

H. HALL & Co. INC. *v.* SUPERIOR PRODUCE COMPANY INC. PACA Docket No. RD-83-279. Decided June 24, 1983.

Respondent was ordered to pay complainant as reparation \$47,396.85 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,656)

TEX-CAL LAND INC. *v.* ARNOLD J. RODIN INC. PACA Docket No. RD-83-280. Decided June 27, 1983.

Respondent was ordered to pay complainant as reparation \$2,126.82 plus 13 percent interest from December 1, 1982, until paid.

(No. 22,657)

DONALD LEATHERMAN *v.* J G S PRODUCE CORP. PACA Docket No. RD-83-281. Decided June 27, 1983.

Respondent was ordered to pay complainant as reparation \$8,251.20 plus 13 percent interest from July 1, 1982, until paid.

(No. 22,658)

ROBERT L. GITMED d/b/a SAN JOAQUIN PRODUCE *v.* NORMAN K. MILLER d/b/a M & W PRODUCE. PACA Docket No. RD-83-282. Decided June 27, 1983.

Respondent was ordered to pay complainant as reparation \$920.30 plus 13 percent interest from October 1, 1982, until paid.

(No. 22,659)

RALPH T. MAY d/b/a/ RALPH MAY FARMS *v.* WILLIAM J. HANLON. PACA Docket No. RD-83-283. Decided June 28, 1983.

Respondent was ordered to pay complainant as reparation \$5,716.80 plus 13 percent interest from April 1, 1982, until paid.

(No. 22,660)

HORWATH AND CO., INC. a/t/a/ GONZALES PACKING CO. v. RODOLFO RUBIO d/b/a GATEWAY PRODUCE CO. PACA Docket No. RD-83-284. Decided June 28, 1983.

Respondent was ordered to pay complainant as reparation \$3,418.20 plus 13 percent interest from November 1, 1982, until paid.

(No. 22,661)

RUSSELL PRODUCE INC. v. ARNOLD J. RODIN INC. PACA Docket No. RD-83-285. Decided June 28, 1983.

Respondent was ordered to pay complainant as reparation \$1,939.50 plus 13 percent interest from January 1, 1983, until paid.

(No. 22,662)

MERRILL FARMS v. RODOLFO RUBIO d/b/a GATEWAY PRODUCE CO. PACA Docket No. RD-83-286. Decided June 29, 1983.

Respondent was ordered to pay complainant as reparation \$1,160.50 plus 13 percent interest from November 1, 1982, until paid.

(No. 22,663)

MENDELSON-ZELLER CO., INC. v. GATEWAY PRODUCE CO. PACA Docket No. RD-83-287. Decided June 29, 1983.

Respondent was ordered to pay complainant as reparation \$2,196.00 plus 13 percent interest from January 1, 1983, until paid.

(No. 22,664)

COLORADO POTATO GROWERS EXCHANGE v. GATEWAY PRODUCE CO. PACA Docket No. RD-83-288. Decided June 29, 1983.

Respondent was ordered to pay complainant as reparation \$4,463.00 plus 13 percent interest from March 1, 1983, until paid.

(No. 22,665)

KAPLAN'S FRUIT & PRODUCE CO., INC. v. D. L. FOOD PURVEYORS INC. a/t/a MDM FOODS. PACA Docket No. RD-83-289. Decided June 30, 1983.

Respondent was ordered to pay complainant as reparation \$6,686.25 plus 13 percent interest from June 1, 1982, until paid.

(No. 22,667)
DON-A-LYNN PRODUCE INC. v. J G S PRODUCE CORP. PACA
No. RD-83-290. Decided June 30, 1983.

Respondent was ordered to pay complainant as reparation \$2
plus 13 percent interest from October 1, 1982, until paid.

(No. 22,667)

VALLEY VEGETABLE SALES v. C AND W POTATO CO. PACA
No. RD-83-291. Decided June 30, 1983.

Respondent was ordered to pay complainant as reparation \$5
plus 13 percent interest from March 1, 1983, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,668)

PURE GOLD, INC. v. AMERICAN MERCANTILE COMPANY,
Docket No. RD-83-170. Order issued May 4, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agri
Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*)
a default Order was issued on March 15, 1983, awarding repar
to the complainant in the amount of \$14,515.20. By letter
of April 11, 1983, respondent has moved that this matter be r
after default.

Accordingly, the order of March 15, 1983, is hereby stayer
The complainant may have fifteen (15) days from receipt of this order
to answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A
copy of respondent's petition shall be served upon the complainant.

(No. 22,669)

DANNY G. LOPEZ d/b/a LOPEZ PRODUCE v. JOHN E. REYN
REYNA BROTHERS PRODUCE AND TRUCKING. PACA Doc
RD-83-120. Order issued May 5, 1983.

ORDER ON RECONSIDERATION

is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued on January 17, 1983. As a consequence of a Default Order received on January 27, 1983, in which counsel for respondent requested a continuance to give it the opportunity to file an answer, a Stay Order was issued on February 9, 1983. In that Stay Order, respondent was notified that it must file a petition for reopening after default, and give good reason why it failed to file a timely answer. Although respondent filed an "Answer," it did not file a petition for reopening after default. Because of respondent's failure, the Default Order was vacated and the Stay Order reinstated on March 3.

After received on April 4, 1983, respondent's attorney has filed a petition to reopen. However, in view of the fact that respondent had ample opportunity to do so in a timely fashion, its petition is denied as untimely filed.

Accordingly, respondent shall pay the complainant the amount due in the January 17, 1983, Default Order within 30 days of the date of this order.

(No. 22,670)

OKER CORPORATION, a/t/a GENERAL BROKERAGE CO. v. HAWAIIAN POTATOES CORP. PACA Docket No. RD-83-136. Order issued January 17, 1983.

ORDER REOPENING AFTER DEFAULT

is proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25(e) of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that a good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 3 Agric. Dec. 790 (1957). Accordingly, respondent's default in failing to file an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

(No. 22,671)

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING v. SA-SO POULTRY SALES CO., INC. PACA Docket No. RD-83-164. Order issued May 13, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

(No. 22,672)

RAIMOND & RAIMOND, INC. v. DAVID LOZANO and JUAN I. VASQUES, JR. d/b/a DAVID'S PRODUCE. PACA Docket No. RD-83-135. Order issued May 24, 1983.

VACATION OF STAY, RULING ON PETITION TO REOPEN AFTER DEFAULT AND REINSTATEMENT OF DEFAULT ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued on February 1, 1983. After respondents petitioned to reopen the matter after default in a letter received on March 1, 1983, a Stay Order was issued on March 28, 1983. Complainant was served with a copy of a the respondent's petition, and filed a response thereto.

Respondents' petition to reopen is based on their contention that "at no time were defendants served with [sic] a written notice that a default judgment would be taken, * * * and that [they] believed that they had 30 days to file answer [sic]." The record does not support this contention. By letter dated December 8, 1982, and served

on respondents on December 13, 1982, the Assistant Chief of the Regulatory Branch, Fruit and Vegetable Division, Agricultural Marketing Service, served respondents with a copy of the formal complaint. In so doing, the Assistant Chief also notified respondents that the answer was due " * * * within 20 days after receipt of * * * " the letter, and the consequence of the failure to file a timely answer as provided in section 47.7(c), (7 CFR §47.7(c)). Moreover, as pointed out by complainant in its objection to the reopening of this matter, even if respondents believed their answer was not due for 30 days, it would still have been due on or before January 12, 1983. Yet, respondent failed to file any response until March 1, 1983.

We find, therefore, that respondents have failed to provide good reason why the default should be set aside. Such good reason is required by the Rules of Practice. 7 CFR §47.25(e).

Accordingly, respondent's petition to reopen after default is denied, the Stay Order of March 28, 1983, is vacated, and the Default Order of February 1, 1983, is reinstated excepted that the reparation, and interest awarded therein, should be paid within 30 days of the date of this order.

(No. 22,673)

NORTH COUNTY FRUIT SALES, INC. v. J. R. CORTES & Co. PACA
Docket No. RD-83-152. Order issued May 24, 1983.

ORDER ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) Respondent was served with a copy of the complaint on December 20, 1982. Although respondent failed to file a timely answer, on February 11, 1983, the Department received a request for an extension of time to answer the complaint from it. By letter dated February 23 1983, the Presiding Officer gave respondent seven days to file a petition to reopen after default. Such a petition is required by 7 CFR §47.25(e). On April 11, 1983, a default order was issued after respondent had been given ample opportunity to petition for reopening after default but failed to do so. By telegram dated April 7 1983, and received by the Presiding Officer on April 12, 1983, respondent has now made such a petition. Respondent's petition is untimely filed. Moreover, respondent failed to provide any reason why it didn't file a timely response to the Presiding Officer's February

23, 1983, letter. Also the Rules of Practice, 7 CFR §47.25(e), require that a respondent give good reason why it failed to file a timely answer which it has not done. Since respondent has failed to file a timely petition to reopen, and also failed to give good reason why the default should be set aside, its petition to reopen after default is denied.

The Default Order of April 11, 1983, is reinstated except that payment shall be made within 30 days from the date of this order.

(No. 22,674)

LOUIE PRODUCE COMPANY v. EVERGREEN SUPPLY Co. PACA
Docket No. RD-83-221. Order issued May 24, 1983.

**DENIAL OF MOTION TO REOPEN AFTER
DEFAULT AND DEFAULT ORDER**

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$28,642.95 in connection with numerous shipments of mixed Chinese vegetables in interstate commerce. A copy of the complaint was served upon respondent, who failed to file an answer within the time allowed for that purpose (7 CFR 47.8). Accordingly, respondent was notified pursuant to 7 CFR 47.8(c), that it was in default and considered to have admitted the allegations of the complaint.

On April 26, 1983, respondent filed a motion to reopen after default, in which it alleged that it was making payments to complainant and requested 60 additional days to pay off its indebtedness. This does not constitute good reason for granting respondent's motion to reopen, in accordance with 7 CFR 47.25(e), and the motion is therefore, denied. The issuance of an order without further procedure is now appropriate, pursuant to 7 CFR 47.8(d).

Complainant, Louie Produce Company, is a corporation whose address is 976 San Julien Street, Los Angeles, California. Respondent, Evergreen Supply Co., is a corporation whose address 20736 Lahser, Southfield, Michigan.

Respondent was licensed or subject to license under the Act at the time of the transactions involved herein. The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order and are a violation of Section 2 of the Act (7 U.S.C. 499b). Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$28,642.95, which we find to be the damages incurred by complainant as a result of respond-

ent's violations of the Act, with interest thereon at the rate of 13% per annum from October 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,675)

PACIFIC FARM COMPANY *v.* SUN-GLO WHOLESALE FRUIT & PRODUCE. PACA Docket No. RD-83-203. Order issued May 25, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$529.90 in connection with a transaction involving the shipment of melons in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 15, 1983, complainant notified the Department that respondent tendered to complainant payment in full of complainant's claim. Complainant, in its letter of April 15, 1983, authorized dismissal of its complainant filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,676)

PURE GOLD, INC. *v.* AMERICAN MERCANTILE COMPANY. PACA Docket No. RD-83-170. Order issued June 20, 1983.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on March 15, 1983. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). A Stay Order was issued on May 4, 1983.

The record has been carefully considered and it is concluded that good reason has not been shown why the relief requested in the motion should be granted. The answer was originally due on December 26, 1982. On December 17, 1982, a 30 day extension was granted by

the Department. On January 21, 1983, an additional extension of 20 days was granted by the Department. However, respondent failed to file an answer within the time provided. Respondent was given sufficient opportunities to file its answer, of which it failed to avail itself. Therefore, respondent's motion to reopen after default is denied.

The May 4, 1983, Stay Order is hereby set aside and the March 15, 1983, Default Order is reinstated. The amount ordered paid in the March 15 Order shall be paid within 30 days from the date of this Order.

Copies of this order shall be served upon the parties.

(No. 22,677)

MONSON BROS. CO. *v.* SUN TRADING CO., INC. PACA Docket No. RD-83-178. Order issued June 20, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). Complainant opposes the granting of respondent's Motion.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agr. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent is given 10 days from service of this order in which to file an answer. Failure to file a timely answer will result in reinstatement of respondent's default.

Copies of this order shall be served upon the parties. (New docket no. PACA 2-6322)

(No. 22,678)

HEBB-HENDRIX, INC. *v.* CRAIG CAMPBELL d/b/a C & C PRODUCE COMPANY. PACA Docket No. RD-83-189. Order issued June 20, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). Although given the opportunity to present its views on whether the default should be set aside, complainant has failed to do so.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agri. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. (New Docket No. PACA 2-6321)

(No. 22,679)

SAHARA PACKING COMPANY *v.* CENTRAL FOODS, INC. PACA DOCKET
No. RD-83-232. ORDER ISSUED JUNE 20, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$546.00 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 24, 1983, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 24, 1983, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,680)

CASTLE & COOKE, INC. *v.* BUY FRESH PRODUCE, INC. PACA Docket No. RD-83-215. Order issued June 24, 1983.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$59,758.65 against respondent in connection with 16 transactions in interstate commerce involving shipments of fruits and vegetables. A copy of the formal complaint was served upon respondent, and respondent has failed to file a timely answer thereto.

Complainant, Castle & Cooke, Inc., is a corporation whose address is P.O. Box 5130, San Jose, California 95150. Respondent, Buy Fresh Produce, Inc., is a corporation whose address is 2928 N.E. 63rd Road, Oklahoma City, Oklahoma 73111. Respondent was licensed under the Act at the time of the transactions involved herein.

Subsequent to the issuance of a Default Order in this proceeding, but before the order was final, the Department was advised that respondent had filed in the United States Bankruptcy Court, for the Western District of Oklahoma designated case number 83-01072A, a voluntary petition in Bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. §§1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. §362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. §362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or that the debts have been discharged.

Copies hereof shall be served upon the parties.

JANUARY-JUNE 1983

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